No. 73-1596

In the Supreme Court of the United States

OCTOBER TERM, 1973

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ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Robert E. Hampton, Chairman, and the Commissioners of the United States Civil Service Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 25, 1974.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-23a) is not yet reported. The opinion of the district court (App. B, *infra*, pp. 24a-35a) is reported at 333 F. Supp. 527.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 36a) was entered on January 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a regulation of the United States Civil Service Commission that bars resident aliens from employment in the federal competitive civil service is constitutional.

CONSTITUTIONAL PROVISION, STATUTE, EXECUTIVE ORDER, AND REGULATION INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Civil Service Act, 5 U.S.C. 3301, provides in pertinent part as follows:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

3. Section 2.1 of Executive Order No. 10577, 19 Fed. Reg. 7521 (November 22, 1954), provides in pertinent part:

> (a) * * * The [Civil Service] Commisison is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

4. The Civil Service Commission's regulations, 5 C.F.R. 338.101, provide in pertinent part:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute.

STATEMENT

The respondents, four resident aliens who immigrated to the United States from China,[1] instituted

[1] Respondent Mow Sun Wong immigrated from Hong Kong in June 1969; respondent Siu Hung Mok immigrated from

the present action in December 1970, naming as defendants the Chairman and the Commissioners of the United States Civil Service Commission, petitioners here, and other government officials.[2]

The respondents challenged Section 338.101 of the Civil Service Commission's regulations (*supra*, p. 3) which excludes aliens from the federal competitive civil service. They contended, *first*, that the regulation was in conflict with congressional appropriation acts governing compensation of federal civil servants,[3]

Macao in October 1968; respondent Francene Lum immigrated from Mainland China in September 1946; and respondent Kae Cheong Lui immigrated from Taiwan in September 1968. A fifth plaintiff in the district court (Anna Yu, a 1965 immigrant from Hong Kong) did not join in the appeal below.

[2] The other defendants below were the Executive Director of the Commission, its Regional Director in San Francisco, the Administrator of the General Services Administration and its Regional Administrator in San Francisco, the Secretary of the Department of Health, Education, and Welfare and that Department's Regional Director in the San Francisco area, and the former Postmaster General, along with two regional officials of the former Post Office Department. None of these defendants has any responsibility for the establishment of standards which applicants for federal civil service employment must meet, and accordingly they have not joined in this petition.

[3] At the time of the institution of this action, the pertinent appropriations act was the Public Works Appropriations Act, 1970, § 502, 83 Stat. 323, 336-337, which provided in relevant part as follows:

> Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States * * * whose post of duty is in continental

and with an Executive Order[4] which bans discrimination in federal employment on the basis of national origin; and *second*, that the regulation violated the Due Process Clause of the Fifth Amendment by impermissibly discriminating against aliens as a class. The respondents sought injunctive and declaratory relief against the petitioners to remove from the regulation the qualification of citizenship as a prerequisite of employment in the federal civil service.

In a memorandum and order issued on August 30, 1971 (App. B), the district court ordered respondents' complaint dismissed for failure to state a claim upon which relief could be granted. Rejecting respondents' non-constitutional arguments, the district court held that Section 338.101 of the Civil Service Commission's regulations was not in conflict with

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> United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence * * * *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

[4] Executive Order No. 11478, 34 Fed. Reg. 12985.

either congressional appropriation acts or the Executive Order (App. B, *infra*, pp. 28a-31a). Alternatively, the court held that even if the regulations conflicted with the Executive Order, the conflict would not be judicially reviewable (*id.* at 29a).

The district court rejected respondents' constitutional challenge on the ground that there was a rational basis for the Civil Service Commission's classification, and that the Commission's regulation was reasonably adapted to a permissible governmental end (*id.* at 31a-34a).

On appeal, the court of appeals reversed (App. A, *infra*), finding that the regulation is within the statutory authority of the Civil Service Commission but holding the regulation unconstitutional. The court stated that this Court's holdings in *Sugarman* v. *Dougall*, 413 U.S. 634, and *Graham* v. *Richardson*, 403 U.S. 365, "although not squarely controlling (because they deal with the states' power to discriminate against aliens *vis a vis* the Fourteenth Amendment) are instructive and significant when applied to the case at hand" (App. A, *infra*, p. 13a). The court concluded that "in the fact situation of this case and with the broad sweep of the regulation involved, we hold that it is so unjustifiable as to be violative of due process" (*id.* at 23a).

REASON FOR GRANTING THE WRIT

The holding of the court of appeals that the regulation of the Civil Service Commission barring aliens from the competitive civil service is unconstitutional

presents an important question specifically reserved by this Court in *Sugarman* v. *Dougall*, 413 U.S. 634, 646, n. 12: "In deciding the present case, we intimate no view as to whether these federal citizenship requirements are or are not susceptible of constitutional challenge."[5] In spite of this reservation, the court below relied on *Sugarman*[6] to hold unconstitutional a policy which has been followed by the federal civil service system since 1896 (Rule V of the Executive Order issued May 6, 1896, reprinted in the *18th Annual Report of the Civil Service Commission* 272 (1902)), and which the court below held the Civil Service Commission is statutorily empowered to adopt (App. A, *infra*, pp. 4a-7a). The power to limit alien access to government employment is an incident of national sovereignty in international law and a power customarily exercised in the international community. (See Roth, *The Minimum Standard of International Law Applied to Aliens* 151-152 (1949), United Nations Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* 53 (1966).)

The distinction between the present case and *Sugarman* lies in the differences between national and state sovereignty in our federal system. As the

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[5] This Court has also recently recognized the existence of this longstanding policy in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 89-91.

[6] And *Graham* v. *Richardson*, 403 U.S. 365, also involving state, not federal, action.

Court's opinion in *Sugarman* made clear, see particularly Part IV of the opinion, 413 U.S. at 646-649, the vice of the New York exclusion there involved was that it reached beyond the legitimate interests of New York as a sovereign political community. But the national government, unlike the states, exercises plenary authority over aliens and defines their rights and duties in numerous statutes and regulations. The Federal Government possesses national sovereignty and is responsible, under our Constitution, for defining the relationship between the nation and the citizens of other nations. The broad scope of this plenary authority has long been recognized in the decisions of this Court.

The dual status of an alien as an American inhabitant but a foreign citizen "leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585-586. As this Court pointed out in *Johnson* v. *Eisentrager*, 339 U.S. 763, 770:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Nowhere in this Court's decisions dealing with the rights of aliens is there a suggestion that among the "generous and ascending scale of rights" granted to aliens is a constitutionally protected right to federal civil service employment. On the contrary, the Court's teaching is clear that:

> * * * any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588-589.]

Alienage—unlike race, color, or national origin—is not a permanent "status," but a temporary condition. Every permanent resident alien is offered naturalization, with all the rights and privileges of citizenship, upon completion of a probationary period (generally five years, see 8 U.S.C. 1427(a)). Where an alien is freely permitted to remove his disabilities by becoming a citizen after the completion of a probationary period whose length is reasonably related to the function of the citizenship-granting process, and where those disabilities are (as here) reasonably related to permissible government objectives, those disabilities do not constitute a denial of due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Attorneys.

APRIL 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1079

MOW SUN WONG, ET AL., APPELLANTS

vs.

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., APPELLEES

[January 25, 1974]

Appeal from the United States District Court for the Northern District of California

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OPINION

Before: BARNES, WRIGHT, and WALLACE, Circuit Judges.

BARNES, Circuit Judge:

On December 27, 1970, appellants, five resident aliens who immigrated to the United States from China, instituted a class action against appellees seeking injunctive relief to prevent appellees from en-

forcing regulations which excluded appellants as resident aliens, from the federal competitive civil service. They also sought injunctive relief to prevent appellees from denying appellants the opportunity to apply for such federal employment positions on the basis of alienage, and a declaratory judgment declaring those portions of the regulations which automatically disqualified aliens from federal competitive civil service positions illegal and void and violative of their constitutional and statutory rights to pursue such jobs.

On August 31, 1971, the District Court denied appellants' motion for summary judgment and granted appellees' motion to dismiss. *Mow Sun Wong* v. *Hampton*, 333 F.Supp. 527 (N.D. Cal. 1971).

This appeal is before this court pursuant to rule 4(a) Fed.R. App.P. As held by the district court, jurisdiction is predicated on 28 U.S.C. § 1331(a) and the $10,000 matter in controversy requirement is met by each of the named class for the reasons concluded by the lower court. *Id.* at 529.[1]

The primary issue which confronts us is a constitutional attack by appellants as resident aliens, upon the regulations of the United States Civil Service Commission (hereinafter Commission) which, in effect, excludes such aliens from employment in the federal competitive civil service. 5 C.F.R. § 338.101

[1] Since an injunction is sought against enforcement of an administrative regulation (5 C.F.R. § 338.101), as distinguished from an Act of Congress, it was not necessary for appellants to request that a three-judge court be empaneled under 28 U.S.C. § 2282.

(1971).[2] The constitutional question is closely similar to that which the Supreme Court refused to intimate a view on, in its recent decision of *Sugarman* v. *Dougall*, 41 U.S.L.W. 5138 (U.S. June 25, 1973): whether the federal citizenship requirements of such provisions as 5 U.S.C. § 3301, Executive Order 10577, 19 Fed.Reg. 7521, § 2.1 (1954), 5 C.F.R. § 338.101, and § 502 of the Public Works Appropriation Act 1971, Pub. Law 91-439, 84 Stat. 902 are or are not susceptible to constitutional challenge. *See also In re Griffiths*, 41 U.S.L.W. 5143 (U.S. June 25, 1973). *Cf. People* v. *Rodriguez*, No. 23069 (Cal. A.2d, Dec. 11, 1973).

In *Dougall* the Court held that a New York statute, which denied aliens the right to hold positions in New York's classified competitive civil service, violated the Fourteenth Amendment's equal protection guarantee. The issue before this Court on appeal is whether the United States Civil Service Commission may, consistent with the Fifth Amendment's due process guarantee, exclude appellants and all other resi-

[2] 5 C.F.R. § 338.101 (1972), the Commission regulations, provide:

> "(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> "(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a non-citizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute."

dent aliens from obtaining employment in the federal competitive civil service.

However, before we are able to decide the constitutional issue, it is necessary to determine if the lower court correctly decided the non-constitutional arguments presented by appellants.

I. Non-Constitutional Issues.

Appellants contend that the Commission regulations, 5 C.F.R. § 338.101 (restricting employment to citizens), are invalid since they exceed the authority provided by Congress in § 502 of the Public Works Appropriation Act, *supra*.[3] The district court rejected

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[3] The Public Works Appropriation Act, 1970, Pub. L. No. 91-144, 83 Stat. 323, 336 (Dec. 11, 1969), provides in pertinent part as follows:

> "Sec. 502. Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post or duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence. . . . *Provided further*, that any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies."

this contention and held that the regulations did not exceed or conflict with § 502. 333 F.Supp. at 531[4] states:

> ". . . Congress has in broad terms granted to the Executive the authority to establish standards for admission into the civil service. 5 U.S.C. § 3301. Plaintiffs would have the court, however, read a provision in an Appropriations Act as negating that express grant of authority. The more sensible view of the relationship between § 502 of the Public Works Appropriations Act and 5 U.S.C. § 3301 is that § 502 merely sets forth the broad contours within which the Executive (the Commission) is free to use its good judgment and expertise. Thus, on the court's view of § 502 and the Commission regulation, no conflict appears. The Commission has acted permissibly in relation to the Appropriations Act in not opening up the civil service to all those whom Congress has indicated it would be willing to pay for their work."

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[4] It is to be noted that if this court were to reverse the District Court on these non-constitutional issues, then it would be unnecessary to reach the constitutional issue, since our holding would be in essence that the regulations are an illegal extension of the authority delegated by Congress to establish requirements for employment in the Executive Branch. *See Jalil* v. *Hampton*, *supra* at 931. However as the text discusses, we affirm the District Court as to the non-constitutional issues.

We agree with the district court on this point. The appropriations acts are not the basis for the regulations and the Commission has acted permissibly in enacting its regulation.

The regulations prohibiting non-citizens from the competitive civil service (5 C.F.R. § 338.101), were issued pursuant to an executive order, Executive Order No. 10577,[5] which itself was issued upon the authority of a federal enabling act, the Civil Service Act, 5 U.S.C. § 3301.[6]

> "Ostensibly clear-cut, the chain of statutory authority progresses from the enabling act, providing the President with delegatable [sic] powers, to the executive order, granting certain of those powers to the Civil Service Commission, to

[5] Sec. 2.1 of Exec. Order No. 10577, 19 Fed. Reg. 7521 (1954), 5 U.S.C. § 3301 (1967), provides in pertinent part as follows:

> "(a) . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations."

[6] 5 U.S.C. § 3301 (1970 ed.) provides:

> "The President may—
>
> (1) Prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section."

> the specific regulation designed to ascertain the fitness of applicants by establishing standards with respect to citizenship." Comment, *Aliens And The Civil Service: A Closed Door?* 61 *Geo. L.J.* 207, 209 1972.[7]

Appellants' second contention of a non-constitutional nature is that the Commission's regulation contravenes Executive Order No. 11478, 34 Fed. Reg. 12985 (1969),[8] which declares it to be the policy of the Fed-

[7] The same commentator attacks what he terms the inconsistency on one hand of the President explicitly authorizing the Commission to set standards with respect to citizenship, Executive Order 10577, *supra*, and on the other hand the Commission expressly excluding all noncitizens from the competitive civil service. 61 *Geo. L.J. supra* at 210. He concludes that it is improbable that such action is permissible in view of the wording of the Civil Service Act. However, we find this argument, along with appellents' contention on the issue, although persuasive, lacking substance and authority, and we agree with the District Court.

[8] Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969):

> EQUAL EMPLOYMENT OPPORTUNITY
> IN THE FEDERAL GOVERNMENT
>
> It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.
>
> As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to

strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for

periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General

eral Government to provide equal opportunity in Federal employment for all persons, and to prohibit discrimination in employment because of race, color, religion, sex or *national origin*. Appellant alleges the key term, "national origin", was intended to apply to permanent resident aliens. The district court, however, correctly interpreted the term "national origin" as being limited to discrimination between United States citizens only and that no distinction should be made on the basis of their respective national origins.

Despite an Equal Employment Opportunity Commission guide-line[9] prohibiting citizenship discrimi-

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Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

/s/ RICHARD NIXON

THE WHITE HOUSE,
August 8, 1969.

[F.R. Doc. 69-9556; Filed, Aug. 8, 1969; 4:24 p.m.]

[9] 29 C.F.R. § 1606.1(d) states in part:

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . ."

nation, the Supreme Court in a recent decision, *Espinoza* v. *Farah Manufacturing Co., Inc.*, 42 U.S.L.W. 4014 (U.S. Nov. 19, 1973), held that such discrimination does not always constitute "national origin" discrimination, and thus is not necessarily barred by § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). The Court found that nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage. *Id.* at 4017. *Espinoza's* application to this case is limited in that it involved only private employment, whereas we are concerned with the right to federal employment under the Civil Service.[10]

Appellants with good reason suggest that § 6 of Executive Order No. 11478, in stating: "This order does not apply to aliens employed outside the limits of the United States", is proof that the order was intended to apply to aliens employed inside the limits of the United States. However, assuming such an interpretation is justified, and the Executive Order is ambiguous on this point so as to permit an interpretation, we still agree with the lower court that even if we are to assume the regulation contravenes Executive Order 11478, such conflict would not be

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[10] It is noted that in *Espinoza*, the Court explicitly stated that it "need not address that question here, for the issue presented in this case is not whether Congress has the power to discriminate against aliens in federal employment, but rather, whether Congress intended to prohibit such discrimination in private employment." *Id.* at 4015-16. The Court recognized this pending case in a footnote. *Id.* at 4015 p. 4.

judicially reviewable (333 F.Supp. at 530), because the Executive Order merely declares a general policy.

Appellants argue that such a conclusion is directly contra to the holding of *Jalil* v. *Hampton*, 460 F.2d 923 (D.C. Cir. 1972) discussed *infra*, which specifically states such an order is judicially reviewable. But the executive order referred to in *Jalil* as being reviewable was not one declaring a general policy, but was the same Executive Order No. 10577 which was the authority upon which the regulations were based.

II. Constitutional Issues

The Commission regulations allow a person to be admitted to competitive examination or given appointment "only if he is a citizen of or owes permanent allegiance to the United States." 5 C.F.R. § 338.101(a)(b). The district court, relying on immigration cases concerning entry and deportation, concludes that Congress' plenary power over aliens lessens the proper standard of judicial scrutiny to be applied to the discrimination and exclusion of aliens from the federal competitive civil service to that of whether the classification has a rational basis. 333 F.Supp. at 532. Appellants contend that the proper burden for the government to meet is that of showing a compelling government interest to justify the discrimination against them and other resident aliens similarly situated by the Commission regulations.

To state that Congress' plenary power over aliens enables the federal government to unreasonably dis-

criminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits. *United States* v. *Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971) (Appellants' Brief, pp. 18-19).[11]

The rationales and holdings of *Sugarman* v. *Dougall*, *supra*, and *Graham* v. *Richardson*, 403 U.S. 365 (1971), although not squarely controlling (because they deal with the states' power to discriminate against aliens *vis a vis* the Fourteenth Amendment) are instructive and significant when applied to the case at hand.

Dougall involved Section 53(1) of the New York Civil Service Law which read:

> "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." 41 U.S.L.W. at 5138.

Justice Blackmun, in holding that the statute violates the Fourteenth Amendment equal protection guarantee, stressed the fact that Section 53 is neither narrowly confined nor precise in its application. Its imposed ineligibility may apply to the "sanitation man, class B (citation omitted), to the typist, and to

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[11] With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government, vis-a-vis citizens of this country.

the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately." *Id.*, at 5141.

The Commission regulation here also sweeps indiscriminately excluding *all* aliens from *all* positions requiring the competitive Civil Service examination. See *Jalil* v. *Hampton*, *supra*, at 930 (Bazelon, J., dissenting).

The Court in *Dougall* was careful to point out that it did not hold that on an individual determination an alien could not be refused or discharged from public employment, even on the basis of noncitizenship, but only if a legitimate state interest relating to qualification for a particular position or to the characteristics of the employee were present. *Sugarman* v. *Dougall*, *supra* at 5142. Thus, for instance, in the present case, if national security were involved in a particular position, or requirements of citizenship as qualifications for political office, the government interest would be compelling enough to offset discrimination against aliens. But, a flat prohibition from any level of federal employment as the regulations dictate creates a different situation. The appellants named in the class are a janitor, file clerk, clerk typist, mail clerk, and educational evaluator. (Appellants' Brief pp. 3-5). Surely these positions and the majority of civil service positions [12] do not ac-

[12] ". . . the Civil Service Commission, discriminates against resident aliens as a class, prohibiting them from qualifying

tually participate either in the making or in the execution of national policy, as contended by appellees. (Appellees' Brief p. 13).

Aliens are a "suspect" class, as stated in *Graham* v. *Richardson*, *supra* at 372, because aliens "are a prime example of a 'discrete and insular' minority (*see United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938)) . . ." and classifications based on alienage are "subject to close judicial scrutiny." 403 U.S. at 372.

Appellees urge that *Graham's* holding be limited to a welfare case. However, *Dougall* clearly cites (Graham as authority for imposing a compelling state interest test in the field of public employment. 41 U.S.L.W. at 5141; *see also Chapman* v. *Gerard*, 456 F.2d 577 (3d Cir. 1972); *Younus* v. *Shabat*, No. 71-C-1423 (N.D. Ill., Nov. 16, 1971). (Appellants' Reply Brief pp. 8-10).

In *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970), the court referred to decisions invalidating state measures discriminating against aliens, and although the holding is inapposite to our situation, the case is relevant in displaying recognition that the federal government, like a state, must show reasonableness of and justification for any measure discriminating against aliens. *Id.* at 846.

Although in *Dougall* and *Graham*, aliens were protected from discrimination on the basis of the Equal

for approximately 2,689,800 government jobs." 61 *Geo. L.J. supra* at 220.

Protection Clause of the Fourteenth Amendment, can the equal protection guarantee against alien discrimination be implied in the Due Process Clause of the Fifth Amendment? In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) the Supreme Court stated at 499:

> "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and therefore we do not imply that the two are always interchangeable phrases. But the Court has recognized that discrimination may be so unjustifiable as to be violative of due process." *See also Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).

Bolling v. *Sharpe* thus makes clear that a federal law may impose such an impermissible discrimination as to be a denial of due process. A number of lower court decisions have recognized this relation between the equal protection guarantee and the Due Process Clause. *Morris* v. *Richardson*, 346 F.Supp. 494, 499 (N.D. Ga. 1972);[13] *Faruki* v. *Rogers*, 349

[13] Provision of Social Security Act which disqualified certain illegitimate children from sharing equally with their half-siblings in survivors' benefits on death of wage-earner parent denied equal protection.

F.Supp. 723 (D. D.C. 1972).[14] *See also Moritz* v. *C.I.R.*, 469 F.2d 466 (10th Cir. 1972); *In re Smith*, 323 F.Supp. 1082 (D. Colo. 1971) stating at 1088:

> "By characterizing the problem presented in this case as one of equal protection, we do not mean to suggest that fifth amendment due process takes in all of fourteenth amendment equal protection. It is enough to note that fifth amendment due process does include an equal protection principle, Shapiro v. Thompson, 394 U.S. 618, 641-642, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), and that the two provisions are co-extensive insofar as they prohibit discrimination based upon race, Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954), and other discriminations which are invidious or deprive persons of constitutional rights. Shapiro v. Thompson, supra."

The question becomes whether or not the Commission's regulations result in such "unjustifiable discrimination as to be violative of due process." Section 352(a)(1) of the Immigration and Nationality Act of 1952 provided that a naturalized citizen, with some exceptions, loses citizenship by continuous residence for three years in the country of origin. Citing *Bolling* v. *Sharpe's* "unjustifiable discrimination" lan-

[14] Held that statute providing that no person shall be eligible for appointment as a Foreign Service officer until he has been a United States citizen at least ten years was not shown to be necessary to further a compelling governmental interest, and thus violated the equal protection guarantee applicable to the federal government through the due process clause of the Fifth Amendment.

guage, the Court held that the statute was discriminatory and violative of due process under the Fifth Amendment, since no restriction against length of foreign residence applied to native-born citizens. Similarly, a flat prohibition against aliens obtaining employment in the civil service is such discrimination to be a denial of due process unless the government can show a compelling interest for maintaining its classification. "While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." *Whitner* v. *Davis*, 410 F.2d 24, 30 (9th Cir. 1969).

In *Jalil* v. *Hampton*, *supra*, in what was essentially the same factual pattern as the present case (a challenge of the same Commission regulations), the District of Columbia Circuit remanded to the trial court to decide the non-constitutional questions, since there were no findings of fact in the district court's order. Judge Bazelon's dissent infers that the remand was based on a desire to "forbear" from ruling on the constitutional question and to dispose of the case on the non-constitutional issues. *Id.* at 931. Here, findings of fact were made and as determined above in deciding the non-constitutional questions against appellant, a resolution of the constitutional issue is indeed necessary. The court in *Jalil* recognized that classifications based on alienage are suspect and that the government need justify such discrimination on the ground of a compelling governmental interest. *Id.* at 929. Judge Bazelon's dissent cites the extreme

injustice involved in excluding all aliens from the federal competitive civil service, and refers to the lower court decision recently affirmed by the Supreme Court in *Dougall*:

> "In Dougall v. Sugarman, *supra*, a three-judge panel struck down, without a factual hearing, a New York statute which excluded all aliens from the competitive class of the Civil Service, on the grounds that none of the interests which New York advanced were adequate justifications for this classification under the standards of Graham v. Richardson. In the case before us, the federal government raises no different, or more compelling interests. It is therefore inconceivable that the Government could establish a compelling state interest at a factual hearing to justify the exclusion of *all* aliens from *all* positions requiring the competitive Civil Service examination." *Id.* at 930.

The question remaining for us is whether the Government has established a compelling interest or proper government objective to justify the total exclusion of aliens from the federal competitive civil service.[15]

Appellees set forth various arguments supporting their position that there is a compelling government interest offsetting any discrimination on the basis of alienage. Also, the District Court raised various

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[15] Appellants on page 24 of their brief make a strong argument for finding that even under the less onerous general rational relationship standard, the government fails to satisfy its burden.

points in support of its finding that the regulations did not violate any constitutional provisions. Most of these points were rejected in *Dougall* when considering whether New York had shown a compelling interest counterbalancing its discriminatory classifications. When applied to the federal discrimination, the arguments break down for similar reasons.

The lower court, in its decision, accepted as one justification for the government's action, the government's "right to provide for the economic security of its citizens before its resident aliens." 333 F. Supp. at 532. This line of reasoning, termed the "special public interest" doctrine, *Crane* v. *New York*, 239 U.S. 195 (1915) (that the government satisfied the economic needs of its citizens by restricting distribution of its resources to its citizens), has been discredited and rejected by the Supreme Court in *Graham* v. *Richardson*, *supra*. The rejection of this doctrine is supported in the public employment area. *Sugarman* v. *Dougall*, *supra* at 5141. The California Supreme Court in *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d 566, 79 Cal. Rptr. 77 (1969), also rejected the "economic security" justification, because the "alien may be a resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state." *Id.* at 88. A resident alien must assume certain obligations in return for being allowed to reside lawfully in the United States. He

must pay taxes. He is subject to military service. 50 U.S.C. App. § 454(a). He contributes to the economic growth and welfare of this country. *Graham* v. *Richardson*, *supra* at 371. While it might be thought he could and should cure his disability by simply applying for and obtaining his citizenship, there appears to be no logical justification for discrimination against aliens on economic grounds.

Appellees also contend that resident aliens have no constitutional right to make or carry out national policy or partake in any of the institutions of government. The lower court found that government "function(s) more smoothly and efficiently and more securely if competitive civil service positions are limited to citizens." 333 F.Supp. at 533. It is an oversimplification to infer, as appellees do, that all aliens should be excluded from the competitive civil service because they "should not be in a position to exercise national sovereignty; clearly, the large majority of civil service positions involve no such responsibilities." 61 *Geo. L.J.*, *supra* at 220.

Appellees, however, assert that the factors of "loyalty and security" make Federal Government service differ vastly from the ordinary employer-employee relationship. This is indeed true. We have no doubt that under certain circumstances our government may, for loyalty and security reasons, properly require citizenship for certain government positions. But the Commission regulations fail to delineate any specific positions where security, loyalty and policy-making require that the citizenship requirement be essential for employment. Instead they automatically

exclude all aliens from the competitive civil service; an instance of overbreadth.

Appellees point to the qualifications for high political office as authority for the proposition that the Constitution is clear in placing control of the government in the hands of citizens only. *Dougall* recognizes the state's right in an appropriately defined class of position to require citizenship as a qualification for office. We think this proper. But as with the Court in *Dougall*, we fail to see how a universal ban on alien employment can be justified because specific positions involve high degrees of security, loyalty, and policy-making. Thus, the problem of insuring loyalty, security and policy-making to citizens can be accomplished more effectively by classifying jobs as to their sensitive and nonsensitive nature. 61 *Geo. L.J.*, *supra* at 221. The regulations fail to make any such distinction.

Appellees point to the universal practice of other nations requiring civil servants to be citizens. Such a contention, though relevant on the reasonableness of the discrimination, does not prove a compelling government interest. Its application toward solving the constitutional issue is questionable.[18]

The conclusion found in *Purdy & Fitzpatrick* v. *California*, *supra*, although a state employment case, also applies here that:

> "The discrimination involved denies arbitrarily to certain persons, merely because of their status as aliens, the right to pursue an otherwise lawful occupation. The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens from other countries. The latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination." 79 Cal. Rptr. at 90.

[18] *See* 61 *Geo. L.J. supra* at 221.

We hold that the Commission regulations unreasonably discriminate against resident aliens based solely on their status as aliens. We reject the contention of the appellants that the protection provided by the Fifth Amendment is co-extensive with the equal protection clause of the Fourteenth Amendment. However, in the fact situation of this case and with the broad sweep of the regulation involved, we hold that it is so unjustifiable as to be violative of due process. Here there is no logical or persuasive reason advanced as to why aliens should be excluded from all federal civil service employment; nor is there a refinement of qualifications such as fluency with English, etc., which may or may not prevent employment of an alien. The broad sweep is the vice. It could be saved only by a compelling governmental interest. We have no doubt such a compelling government interest can be shown as to many civil service jobs, but the government has failed to show such a compelling interest for all jobs, and thus, the flat prohibition of the Commission regulations, 5 C.F.R. § 338.101, is a denial of due process, and unconstitutional. We thereby reverse and remand with instructions to grant appellants the injunctive relief sought.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-70 2730 RFP

[Original Filed Aug. 31, 1971]

MOW SUN WONG, et al., PLAINTIFFS

v.

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., DEFENDANTS

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

• • • •

This is an action by Chinese residents of the United States, seeking to overturn regulations of the United States Civil Service Commission ("Commission") which exclude these non-citizens from the competitive civil service. 5 C.F.R. § 338.101 (1971). The Commission is authorized to establish standards with respect to citizenship by Executive Order No. 10577 § 2.1(a), 19 Fed. Reg. 7521:

> The Commission shall be responsible for open competitive examinations for admission to the competitive service which will fairly test the relative capacity and fitness of the persons examined for the position to be filled. The Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

The authority whereby the President promulgated this Executive Order lies in the delegation by Congress to the President to promulgate standards for admission into the civil service. 5 U.S.C. § 3301.

Plaintiffs—Chinese residents who have been denied the opportunity to apply for federal civil service jobs—challenge only the Commission's regulation. In pertinent part, that regulation reads:

> § 338.101 *Citizenship*
>
> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen of or owes allegiance to the United States. • • •

Plaintiffs contend that this regulation contravenes the due process clause of the Fifth Amendment; violates Executive Order No. 11,478 (relating to freedom from job discrimination within the federal government) and conflicts with § 502 of the Public Works Appropriation Act, 1970, Pub. Law 91-144, 83 Stat. 336-337, (relating to compensation of employees of the government). Plaintiffs seek a declaration of invalidity of the Commission's regulation on any one of the above grounds, and an injunction to restrain the defendants—who are members of the Civil Service Commission, the Administrator of the General

Services Administration, and the heads of various other governmental agencies—from continuing to act upon the regulation.

Initially, the government contends in response that no subject matter jurisdiction resides in this court, or that sovereign immunity stands as a bar to this action. The court rejects both of these contentions.

Subject matter jurisdiction over this action is conferred by 28 U.S.C. § 1331(a), the federal question section. That provision grants to this court original jurisdiction of all civil actions wherein the matter in controversy exceeds $10,000 and arises under the Constitution or laws of the United States. Plaintiffs specifically allege that "the matter in controversy" from their viewpoint is certainly in excess of the jurisdictional amount. While it is admittedly difficult to value the right to a job, looking at the issue from the vantage of plaintiffs (see 1 Moore's *Federal Practice*, ¶ 0.91[1] at 827) and considering the importance of the right asserted (cf. *Hague* v. *C.I.O.*, 307 U.S. 496, 529-532 (separate opinion of Mr. Justice Stone); *Murray* v. *Vaughn*, 300 F.Supp. 688, 649-695 (D. R.I. 1969), the court is persuaded that the jurisdictional amount is satisfied by each plaintiff herein. Moreover, § 1331 is available as a jurisdictional basis even though no monetary relief is sought. See 1 Moore's *Federal Practice*, ¶ 0.95 at 862-863.

There is of course no doubt that this action is one which "arises under" the Constitution and the laws of the United States. The basic allegation is that the Commission's regulation is invalid because it is unconstitutional or at least is fatally inconsistent with a Congressional enactment. In other words, a non-frivolous claim is set up and rests directly upon federal law. Accordingly, the action "arises under" that law within the meaning of § 1331. See generally Wright, *Federal Courts* (2nd Ed. 1970) §§ 17, 18. This court therefore has jurisdiction of the within action.

The government also contends that this suit is in reality one against the United States, the sovereign, and that no statute sets up the right to sue the United States herein. That is, the sovereign has not waived its immunity from suit. This contention is easily met, however. Whether or not a given suit can properly be characterized as one against the sovereign—an inquiry which is probably analytically unsound anyway—the established law is that sovereign immunity does not bar a suit against federal officers where it is alleged that the officer's action is "not within the officer's statutory powers, or their exercise in the particular case, are constitutionally void." *Malone* v. *Bowdoin*, 369 U.S. 643,647 (1962), quoting from and reaffirming *Larsen* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). See generally 3 Davis, *Administrative Law Treatise*, § 27.01 at 546-547, § 27.03, § 27.10. Since the plaintiffs in this action contend that the defendant's actions violate both the Constitution and their statutory authority, the doctrine of sovereign immunity is certainly inapplicable. *Laycock* v. *Kenney*, 270 F.2d 580,584 (Ninth Cir. 1959).

On the merits of the case, the court believes the non-constitutional arguments of the plaintiffs to be more substantial than their constitutional arguments, but for the reasons to be stated herein, it is the government's urgings on the merits which are correct.

Plaintiffs contend that the Commission regulation in question contravenes Executive Order No. 11478, 34 Fed. Reg. 12985 (Filed August 8, 1969) (Ex. "C" to complaint). This Order declares it to be the policy of the Federal Government, and that discrimination based upon race, color, religion, sex, or national origin is expressly prohibited. Plaintiffs hinge upon the reference to "national origin" and conclude that discrimination based upon citizenship status is prohibited. But from the face of the document itself, this conclusion appears incorrect. The initial language of the Order is: "It has long been the policy of the United States Government * * *", indicating that this Order was not intended to establish a new policy generally, let alone a new policy specifically on the subject of citizenship as a prerequisite to entrance to the competitive civil service. Furthermore, it is reasonably clear that the reference to "national origin" was intended to convey the policy that *as between United States citizens*, no distinction should be made on the basis of their respective national origins. Thus, the reasonable interpretation of the Executive Order in question establishes that the Commission's regulation is not violative of that Order.

This analysis of the Order has proceeded upon the assumption that a purported conflict between an Executive Order and an agency regulation is court reviewable. That is, plaintiffs assume that an agency regulation may be declared invalid on the basis of an Executive Order. This proposition appears highly doubtful, and even more so in the case of an Executive Order which merely declares a general policy. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (D.C. Cir. 1965); *Nat'l. Assn'n. of Internal Revenue Emp.* v. *Dillon*, 356 F.2d 811 (D.C. Cir. 1966). Thus, this court would also conclude that even if the Commission's regulation did conflict with the Executive Order, such a conflict would not be judicially reviewable.

Plaintiffs' oth " main non-constitutional argument is that the Commission's regulation is inconsistent with § 502 of the Public Works Appropriation Act, 1970, Pub. Law 91-144, 83 Stat. 336-337, which provides in pertinent part as follows:

> [N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citi-

> zen of the United States prior to such date, (3) is a person who owes allegiance to the United States * * * *

Plaintiffs contend that the Civil Service Commission has impermissibly narrowed this Congressional enactment by wholly omitting that class of persons within category (2), and by restricting those within category (3) to persons who owe permanent allegiance to the United States. 5 C.F.R. § 338.101. It appears to this court, however, that the above section of the Appropriations Act did *not* derogate from the power of the Executive, granted in 5 U.S.C. § 3301, to establish standards for admission to the competitive civil service. Section 502 of the Appropriations Act has been part of the Act since the 1963 Act. There is no legislative history dealing with the provision. From this, two guides emerge: (1) the provision was obviously not intended to institute a significant change in Congressional policy, else debate would have surfaced; and (2) this court, in understanding this provision, should give to it whatever plain and natural meaning its words convey.

Following these guides, the court does not find any conflict between the provision of the Act and the Commission regulation. The Act merely sets forth those categories of persons who may be paid for their work as a federal employee. The Act does *not* state that those categories of persons must be eligible for competitive civil service positions.

This distinction is not a trifling one. The point of it is that Congress has in broad terms granted to the

Executive the authority to establish standards for admission into the civil service. 5 U.S.C. § 3301. Plaintiffs would have the court, however, read a provision in an Appropriations Act as negating that express grant of authority. The more sensible view of the relationship between § 502 of the Public Works Appropriations Act and 5 U.S.C. § 3301 is that § 502 merely sets forth the broad contours within which the Executive (the Commission) is free to use its good judgment and expertise. Thus, on the court's view of § 502 and the Commission regulation, no conflict appears. The Commission has acted permissibly in relation to the Appropriations Act in not opening up the civil service to all those whom Congress has indicated it would be willing to pay for their work.

Buttressing this conclusion in the observation that the authority and the discretion to establish standards for civil service qualification resided in the Executive long prior to the passage of § 502 of the Appropriations Act. If Congress had intended to withdraw this discretion, some mention of this important purpose would surely have been made, either in the Congressional debates, or on the face of the statute itself. Changes in established policy are not usually implemented silently. The court therefore concludes that the Commission's regulation is not invalid as inconsistent with the Appropriations Act.

Plaintiffs' constitutional arguments, while certainly not frivolous, are not as persuasive as the non-constitutional arguments just rejected.

Plaintiffs contend that the Classification herein,

between citizen and non-citizen, is subject to the rigid scrutiny of the "compelling interest" test, either because the classification is inherently suspect, or infringes upon a fundamental right. Plaintiffs then contend that when this strict test is applied, the classification must fall, since the federal government can offer no compelling justification.

In the court's view, however, this mode of analysis is incorrect. The Supreme Court has consistently pointed out that Congressional power—and, by a proper delegation, Executive power—respecting aliens is quite broad, almost plenary. *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1951); *United States* v. *ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1949); *Carlsen* v. *Landon*, 342 U.S. 524 (1951). This extensive power is based in part upon the following considerations enunciated by Mr. Justice Jackson:

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [citations omitted].

Harisiades v. *Shaughnessy*, 342 U.S. at 588-589. The broad power over aliens also stems from Article 1, § 8 C1.4 of the Constitution, wherein Congress is given the exclusive power, "To establish a uniform rule of naturalization", and from Article 1, § 8 C1.18, wherein Congress is empowered to make all laws

which are "necessary and proper" for carrying into execution its enumerated powers. Moreover, the plenary power of the Congress with respect to aliens is further illustrated by those Supreme Court cases which have struck down state statutes respecting aliens because these statutes conflicted with the federal power to regulate immigration and naturalization. E.g., *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1947); *and cases cited therein* at 334 U.S. 419, n.6. In the latter case, Mr. Justice Black spoke for seven members of the Court:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. 334 U.S. at 419.

Given these authoritative statements on both the expansiveness of the power over aliens, and the partially political, non-justiciable content of that power, this court cannot agree with plaintiffs herein that the federal government must demonstrate a compelling interest for the classification it has drawn between citizens and non-citizens.[1] Rather, the proper

[1] The court notes that the regulation of the Civil Service Commission here under attack does not in fact draw a bright line between citizens and non-citizens, since those who owe permanent allegiance to the United States are also grouped with citizens. Just what constitutes permanent allegiance short of citizenship itself is not clear, but the plaintiffs have intentionally not availed themselves of that category since they aver only allegiance, not permanent allegiance, and attack the latter requirement.

standard of scrutiny here is the traditional one: Does the classification have a rational basis? or: Is the regulation reasonably adapted to some permissible end? See generally *Shapiro* v. *Thompson*, 394 U.S. 618, 661-663 (dissenting opinion of Mr. Justice Harlan).

When the classification herein is considered on the basis of this test, its validity is clear. The competitive civil service is an integral part of the Executive Branch of the government. It is quite rational and reasonable for the Executive, via a grant of power from the Legislature, to determine that the formation of policy and its execution, at whatever level, should be entrusted only to United States citizens. Moreover, as an alternative rational basis for the regulation herein, the Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens.

The wisdom of the policy attacked in this court is simply not in issue here. The court must confine its inquiry more narrowly. Within this narrower examination, the court can only conclude that the government has the right to provide for the economic security of its citizens before its resident aliens, and that the government is entitled to think that it will function more smoothly and efficiently and more securely if competitive civil service positions are limited to citizens.

Accordingly, the court concludes that plaintiffs have failed to state a claim upon which relief can be granted. The defendants' motion to dismiss is granted; plaintiffs' motion for summary judgment is denied. The case is ordered dismissed.

So Ordered.

Dated: August 30, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Jan. 25, 1974

Re: No. 72-1070 MOW SUN WONG, ET AL. *vs.*
ROBERT E. HAMPTON, ETC., ET AL.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-25-74 reversing and remanding the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U. S. Court of Appeals

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 537778 230

Supreme Court, U. S.
FILED
JUL 18 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED APRIL 24, 1974
CERTIORARI GRANTED JUNE 10, 1974

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(The Opinion and the Judgment of the Court of Appeals and the Opinion of the District Court are printed in the Appendixes to the Petition for a Writ of Certiorari filed in this case and will not be reprinted in this Appendix.)

553-034 O—74——1

In the Supreme Court of the United Staies

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE NINTH CIRCUIT

RELEVANT DOCKET ENTRIES

Statistical Record	Costs	Date	Name or receipt No.	Rec.
J.S. 5 mailed, Dec. 22, 1970	Clerk	12-22-7-	———	15.00
				150.0
J.S. 6 mailed, Aug. 31, 1971	Marshal			
Basis of Action:	Docket fee			
Civil Rights (re jobs, U.S. Agencys) inj.—mandamus Declar. relief.	Witness fees			
Action arose at:	Depositions			

Date	Proceedings	Date Order or Judgment Noted
1970		
Dec. 22	1. Filed complaint and issued summons.	
	2. Filed Order for service other than US Marshal. (Clerk).	
Dec. 28	3. Filed Summons on Ret. ex. on 12/22/70.	
1971		
Jan. 26	4. Filed re-assignment of case to Judge Schnacke	—M—M—M
Jan. 29	5. Filed pltf. No. of Mo., & Mo. for summary judgt. and memo pts. & auths in sup of Mo.	—M—M—M
Feb. 1	6. Filed Decl. of ser. by mail.	
Feb. 18	7. Filed Stip & Ord Ex time to Mar. 12–71 to Ans complaint.	
Feb. 25	8. Filed Amended No. of Mo. for Summary Judgt. hrg. 3/19 2:30.	
Mar. 18	9. Filed Stip. & Ord ext. time thru 3/26 to ans. comp.	RFP
Mar. 19	10. Filed amended No. of Mo. for Summary Judgt. tp 4/16 2:30.	
Apr. 2	11. Filed deft. No. of Mo. & Mo. to dismiss w/ memo pts. & auths.	
Apr. 14	12. Filed pltf. reply brief to deft. memo. in sup. of Mo. to dism.	
Apr. 16	13. Filed proof of ser deft memo. in sup of mo. to dism ORD: hrg. on Mo. to Dism, & Mo. for summary judgt. cont to 5/3 2:00	RFP
Apr. 23	14. Filed deft. reply to pltf. opp to Mo. to dism.	
May 3	15. ORD: Mo. to dism and Mo. for summary judgt. submitted, additional affdts. to be filed	RFP
May 7	15. Filed Stip. for filing briefs thru 5/14 for pltf and 30 days after for deft.	
May 19	16. Filed Stip. & Ord. ext time thru 5/28 for pltf. to file briefs and 30 days later for deft to file	RFP
June 7	17. Filed supplemental Memo of pts and auth. in support of mo. for summ jdgmt.	
July 9	18. Filed deft. supplemental reply.	
Aug. 19	Ordered assigned to Judge Williams for all further proceedings.	
Aug. 31	19. Filed Memo. and Ord. granting deft Mo. to dismiss	RFP
Oct. 29	20. Filed Notice of Appeal.	
	21. Filed declaration of service of Notice of appeal.	
	22. Filed Mo. for leave to proceed in forma pauperis.	
	23. Filed ORD. granting leave to proceed in forma pauperis.	
Nov. 22	Mailed Clerk's No. of appeal to all parties.	
1972		
Jan. 11	24. Filed designation of record on appeal.	
Jan. 14	Made, Mailed Record on Appeal to 9th CCA.	

In the United States District Court for the Northern District of California

No. 70 2730 RFP

[Filed Dec. 22, 1970, C. C. Evensen, Clerk]

MOW SUN WONG, SIU HUNG MOK, ANNA YU, SISTER FRANCENE LUM, AND KAE CHEONG LUI, INDIVIDUALLY ON THEIR OWN BEHALF AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION; JAMES E. JOHNSON, L. J. ANDOLSEK, COMMISSIONERS OF THE UNITED STATES CIVIL SERVICE COMMISSION; NICHOLAS J. OGANOVIC, EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION; ASA T. BRILEY, REGIONAL DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION; ROBERT L. KUNZIG, ADMINISTRATOR OF UNITED STATES GENERAL SERVICES ADMINISTRATION; THOMAS HANNON, REGIONAL ADMINISTRATOR OF GENERAL SERVICES FOR SAN FRANCISCO REGION; ELLIOT RICHARDSON, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; ROBERT COOP, REGIONAL DIRECTOR, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; WINTON BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES; LIM POON LEE, POSTMASTER OF THE CITY AND COUNTY OF SAN FRANCISCO; AND RUSSEL E. JAMES, REGIONAL DIRECTOR, UNITED STATES POST OFFICE DEPARTMENT, DEFENDANTS

Complaint for Injunctive, Mandamus, and Declaratory Relief (Civil Rights)

I. JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1339, 28 U.S.C. § 1343, (1), (4), 28 U.S.C. § 1346, and 28 U.SC § 1361.. This action is also brought pursuant to 5 U.S.C. § 702. The amount in controversy in this action, exclusive of interest and costs, ex-

ceeds Ten Thousand Dollars ($10,000.00) for each named plaintiff.

2. Declaratory judgments are authorized by 28 U.S.C. §§ 2201 and 2202.

3. Venue for this action is provided in 28 U.S.C. § 1391(e).

II. PRELIMINARY STATEMENT

1. This is an action for injunctive relief and declaratory relief to prevent the continuing deprivation of plaintiffs' constitutional right to have the opportunity to be employed in a competitive Federal Civil Service position. This action seeks preliminary and permanent injunctions to restrain the defendants from continuing to act upon presently adopted regulations and procedures, under which they deny non-citizens the opportunity to compete for employment in the competitive Federal Civil Service, the federal General Services Administration, the United States Department of Health, Education, and Welfare, the United States Post Office, and all other federal agencies. Such deprivation of non-citizens' constitutional rights in seeking these federal jobs violates the equal protection and due process guarantees of the Due Process Clause of the Fifth Admendment of the Constitution of the United States, plaintiff's statutory rights under 42 U.S.C. § 2000d, and their rights under Executive Order 11,478 (34 Fed. Reg. 12,985, Aug. 8, 1969).

2. This action also seeks a declaratory judgment declaring that the statutes, regulations, and procedures—which deprive non-citizens of their rights to employment in the Federal competitive Civil Service, the General Services Administration [hereinafter referred to as "G.S.A."], the United States Department of Health, Education, and Welfare [hereinafter referred to as "H.E.W."], the United States Post Office, and all other federal agencies—deny plaintiffs and all others similarly situated of their constitutional and statutory rights to apply for such employment.

III. PLAINTIFFS

1. Plaintiff MOW SUN WONG is a Chinese resident of the United States, residing presently in San Francisco, California. He has filed his declaration of intent to become a citizen of the United States; however, he is not yet a citizen. He presently is working as a janitor for G.S.A. under a salary provided by

the California Supplemental Training and Employment Program [hereinafter referred to as "STEP"]. MOW SUN WONG's stipend under this program will terminate on or about February 19, 1971.

2. Plaintiff SIU HUNG MOK is a Chinese resident of the United States, residing presently in San Francisco, California. He has filed his declaration of intent to become a citizen of the United States; however, he is not yet a citizen. SIU HUNG MOK also had been paid by STEP and was being trained as a file clerk for the federal government. SIU HUNG MOK left the STEP program in November, 1970 and is now employed in another capacity.

3. Plaintiffs ANNA YU and SISTER FRANCENE LUM are Chinese residents of San Francisco who are not citizens of the United States. Each has attempted to apply for jobs affected by the United States Civil Service Commission regulations. Their applications have been refused, because they are not citizens of the United States.

4. Plaintiff KAE CHEONG LUI is a Chinese resident of San Francisco, who is not a citizen of the United States. He began working for the United States Post Office, but was shortly thereafter terminated from that employment because he was not a citizen of the United States.

IV. DEFENDANTS

1. Defendants ROBERT E. HAMPTON, as Chairman of the United States Civil Service Commission; JAMES E. JOHNSON and L. J. ANDOLSEK, as Commissioners of the United States Civil Service Commission; NICHOLAS J. OGANOVIC, as Executive Director of the United States Civil Service Commission; and ASA T. BRILEY, Regional Director of the United States Civil Service Commission, are responsible for the administration of the United States Civil Service both nationally and in San Francisco, California.

2. Defendants ROBERT L. KUNZIG, as Administrator of the United States General Services Administration; and THOMAS HANNON, Regional Administrator of General Services for the San Francisco Region, are responsible for the administration of the United States General Services Administration both nationally and in San Francisco, California.

3. Defendants ELLIOT RICHARDSON, as Secretary of the Department of Health, Education, and Welfare; and ROBERT

COOP, Regional Director of the Department of Health, Education, and Welfare, are responsible for the administration of the Department of Health, Education, and Welfare both nationally and in San Francisco, California.

4. Defendants WINTON BLOUNT, Postmaster General of the United States; LIM POON LEE, Postmaster of the City and County of San Francisco; and RUSSEL E. JAMES, Regional Director of the United States Post Office Department, are responsible for the administration of the Post Office both nationally and in San Francisco, California.

V. BASIS OF CLASS ACTION

1. Plaintiffs MOW SUN WONG, SIU HUNG MOK, ANNA YU, SISTER FRANCENE LUM, and KAE CHEONG LUI bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all other non-citizens of the United States who are similarly situated and aggrieved by the regulations and procedures adopted by the United States Civil Service Commission, G.S.A., H.E.W., the United States Post Office, and all other federal agencies, who do not permit them to be employed in competitive positions with the United States government.

2. Plaintiffs MOW SUN WONG, SIU HUNG MOK, ANNA YU, SISTER FRANCENE LUM, and KAE CHEONG LUI bring this action as a class action for the following reasons: the questions of law and fact are common to the plaintiffs and to the class they represent; the members of the class are so numerous as to make joinder impractical; the claims of the plaintiffs are typical of the claims of all members of the class; the plaintiffs fairly and adequately represent the claims of all members of the class; the defendants are acting on grounds generally applicable to the entire class; the question of law and fact common to the class predominates over any questions affecting individual members; and a class action will best provide a fair and efficient adjudication of the important issues at stake here.

VI. STATEMENT OF CLAIM

A.

1. Plaintiffs MOW SUN WONG and SIU HUNG MOK are immigrants from China who intend to become citizens of the United States. They came here understanding the principles

of freedom governing this country, with the expectation that through their own hard work they would be able to become useful citizens of the United States. To this end, MOW SUN WONG and SIU HUNG MOK have spent long and arduous hours attempting to learn English, to learn the principles of the United States Constitution, and to acquire necessary skills so that they can continue to support themselves and their families. Plaintiffs MOW SUN WONG's and SIU HUNG MOK's perseverance was rewarded when they were able to temporarily obtain employment through the STEP program. This program provided plaintiffs with training, a salary, and then assignment to an employer who may retain them after the STEP program terminates.

2. Plaintiff MOW SUN WONG was assigned to G.S.A. for work as a janitor. His performance at this job has been excellent and, consequently, his supervisor wishes to keep MOW SUN WONG employed as a regular employee of G.S.A.

3. MOW SUN WONG meets the requirements for this position with G.S.A. in every way save one: he is not a citizen of the United States.

4. The requirement of United States citizenship is not one imposed by his supervisor. It is a rule promulgated by the United States Civil Service Commission in its Federal Personnel Manual. The requirement applies to all jobs in which the general Civil Service examination must be taken in order to qualify for employment. This requirement of United States citizenship is the sole reason that MOW SUN WONG cannot presently be employed by G.S.A. He will continue to work at G.S.A. until his STEP employment terminates on February 19, 1971, with the hope that this unreasonable rule will meanwhile be changed.

5. SIU HUNG MOK was employed through the STEP program as a file clerk with the G.S.A. Federal Records Center. He likewise performed ably, and his supervisor also wanted to retain him on a permanent basis. The sole reason that he could not be retained was that he was not a citizen of the United States.

B.

1. ANNA YU is also not a citizen of the United States. She came to the United States in 1965 after completing English High School in Hong Kong. She attended Dominican College

and then completed her bachelor's degree in social welfare at the University of California at Berkeley.

2. On or about October 8, 1970 ANNA YU attempted to file an application through the United States Civil Service Commission for a position as a clerk typist. She completed the Personal Qualification Statement (see Exhibit "A" attached to this Complaint) and took the form to the Federal Building at 450 Golden Gate Avenue in San Francisco, California. The personnel clerk for the Civil Servce Commission informed Miss Yu that her answer to question No. 24—stating that she was not a citizen of the United States—made her application unacceptable.

C.

1. SISTER FRANCENE LUM was admitted in the Catholic Order, Sisters of Loretto, in 1947. She is not a citizen of the United States.

2. SISTER FRANCENE LUM received a Bachelor of Arts degree from Webster College, a Master's degree in education at St. Louis University, and has done graduate work at Stanford, Johns Hopkins, University of Kansas, and Seton Hall Universities. She taught mathematics and Chinese as a second language at the high school level for 15 years.

3. SISTER FRANCENE LUM attempted to apply for a position with the Civil Rights Division of H.E.W. She was told by Floyd Pierce, Regional Director, that she had to be rated to qualify for any position. When she contacted the Federal Job Information Center, she was told by the Information Officer that she could not be "rated" because she was not a citizen of the United States.

D.

1. KAE CHEONG LUI has been living in the United States since 1967. During this period, he has continuously sought employment in various capacities. Despite these efforts, he is presently unemployed and has been forced to depend on welfare for the support of his family.

2. In September of 1970, KAE CHEONG LUI was able to obtain work loading and unloading mail for the United States Post Office. On October 19, 1970, he was notified that he was being terminated from this employment because he was not a citizen of the United States (see Exhibit "B" attached to this Complaint). This was the sole reason for his termination.

E.

1. The situation of the plaintiffs represents only a minute portion of the unemployment problem among non-citizens in the United States. In 1969, around four million aliens reported that they were living in the United States. A large number of them have arrived in the United States in the last four years since the immigration quotas have been changed.

2. These immigrants face special problems in seeking employment in this country. They face a foreign culture, language, and system of government, while simultaneously they must battle the inherent problems of all poverty stricken persons. If all jobs were open to them, their task in seeking employment would still not be an easy one.

3. The magnitude of the unemployment problem can be seen in every facet of their lives. They are forced to live in ghettos, in homes that are spared from condemnation only because there are no other homes in which they could live. Their economic condition robs them of the very freedom they came to this country to enjoy.

F.

1. Despite these special problems of unemployment among immigrants, the United States Civil Service Commission and all other federal agencies refuse to allow non-citizens to seek jobs in the competitive service. According to publications of the United States Civil Service, 300,000 jobs in the federal government become available each year; yet non-citizens continue to be deprived of their rights and opportunity to compete for these jobs. Non-citizens are not permitted to compete with citizens in civil service examinations. The only time non-citizens may be employed are the few situations when qualified citizens are not available, or when agencies are filling positions excepted from the competitive civil service. Thus citizens of the United States have an arbitrary and unlawful advantage in seeking federal civil service jobs.

G.

1. In light of the employment discrimination faced by persons of foreign national origin, the President of the United States issued an executive order declaring a policy of equal employment opportunity in the federal government (see Exhibit "C" attached to Complaint). As stated in the executive order:

> It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, *or national origin*, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.
>
> • • • • •
>
> The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer. . . .

Executive Order 11478, filed Aug. 8, 1969 (34 Fed. Reg. 153) [Emphasis added.]

2. In direct contradiction to this Order, the United States Civil Service Commission, G.S.A., H.E.W., the United States Post Office, and all other federal agencies do not permit non-citizens to apply for competitive civil service positions.

VII. FIRST CAUSE OF ACTION

As a FIRST CAUSE OF ACTION, plaintiffs reallege as if fully set forth the allegations set forth in parts I through VI of this Complaint, and further allege:

1. The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees that all persons residing in the United States are entitled to equal protection under the laws of the United States.

2. The present regulations and procedures of defendants do not allow non-citizens to apply for jobs with either their respective agencies or any other federal agencies.

3. The United States Civil Service Commission does not allow non-citizens to apply for jobs in the competitive Civil Service. Under Civil Service Commission regulations,

> A noncitizen may be appointed to a competitive position only as an exception to the general requirement that such positions be filed by United States citizens.
>
> Federal Personnel Manual, § 11.2.

4. The present position of the United States Civil Service Commission is further stated in the letter of its Executive Director, NICHOLAS J. OGANOVIC, to Mr. L. Ling-Chi Wang, on September 18, 1970. The letter states

> Thus the Civil Service Regulations have always required applicants for competitive examination to be citizens.
>
> • • • • •
>
> We appreciate that many competent Chinese aliens, as well as other resident aliens, have little chance to obtain Federal civil service jobs in the continental United States.

Letter from Nicholas J. Oganovic, Executive Director of the United States Civil Service Commission [attached as Exhibit "D" to this Complaint].

5. Furthermore, G.S.A., H.E.W., the United States Post Office, and all other federal agencies have similarly adopted regulations and procedures which deny plaintiffs and all others similarly situated their right to apply for jobs in these federal agencies.

6. Since citizens of the United States have the opportunity to compete for federal employment, this arbitrary discrimination against plaintiffs and other non-citizens under federal regulations and procedures denies them their rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment of the United States Constitution.

VIII. SECOND CAUSE OF ACTION

As a SECOND CAUSE OF ACTION, the plaintiffs reallege as if fully set forth the allegations set forth in parts I through VII of this Complaint, and further allege:

1. The Fifth Amendment to the United States Constitution guarantees all persons in the United States are entitled to due process of law.

2. The regulations and procedures adopted by defendants and other federal agencies arbitrarily and irrationally deny plaintiffs and all others similarly situated their opportunity to compete for jobs within federal agencies.

3. This arbitrary and irrational denial, without providing plaintiffs any due process of law, violates plaintiffs' rights under the Due Process Clause of the Fifth Amendment of the United States Constitution

IX. THIRD CAUSE OF ACTION

As a THIRD CAUSE OF ACTION, plaintiffs reallege as if fully set forth the allegations set forth in parts I through VIII of this Complaint, and further allege:

1. Under the Civil Rights Act of 1964, the United States Congress established a federal right to be protected from discrimination under any program receiving federal financial aid.

2. Specifically, in Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. § 2000d), the United States Congress promulgated the following law:

> No person in the United States shall, on the ground of *race*, color, or *national origin*, be excluded from participation in, or be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance. (Emphasis added)

3. The defendants are receiving federal financial assistance to administer their respective federal agencies.

4. Yet, defendants' regulations and procedures discriminating against the employment of non-citizens in these agencies exclude plaintiffs and all other members of the class they represent from these jobs because of their national origin. Furthermore, many members of the class are also excluded because of their Chinese ethnicity, their impoverished condition and/or—even for some members—their recent immigration to the United States.

5. By not allowing plaintiffs and all others similarly situated to apply for jobs in the competitive federal service, defendants are excluding them from being employed by federal agencies. Such an exclusion constitutes discrimination against them because of their national origin and, for many, because of their race, in violation of Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. § 2000d).

X. FOURTH CAUSE OF ACTION

As a FOURTH CAUSE OF ACTION, plaintiffs reallege as if fully set forth the allegations set forth in parts I through IX of this Complaint, and further allege:

1. Under Executive Order 11,478 (see Exhibit "C" attached to Complaint), the President of the United States has guaranteed equal employment opportunity to all persons, regardless of race, color, religion, sex, or national origin.

2. The United States Civil Service Commission, G.S.A., H.E.W., the United States Post Office, and all other federal agencies have failed to comply with this Order by arbitrarily

excluding aliens from employment in competitive civil service positions. Such an exclusion constitutes a denial of plaintiffs' rights under Executive Order 11,478.

XI. BASIS FOR INJUNCTIVE RELIEF

1. Plaintiffs and all members of the class they represent will suffer irreparable injury if immediate action is not taken to guarantee their equal opportunity to compete for employment in the United States Civil Service. Plaintiffs are suffering each day by being forced to take demeaning jobs, jobs with less pay, or by being forced onto the rolls of the unemployed. Each day, plaintiffs suffer immediate and irreparable harm through this denial of their right to compete equally for federal civil service appointments.

2. No previous application for the relief sought herein has been made to this or any other Court.

3. No adequate remedy at law is available to the plaintiffs or to members of the class they represent.

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and all members of the class they represent, that this Court:

1. Issue preliminary and permanent injunctions preventing defendants and all other federal agencies from continuing to deny plaintiffs and all others similarly situated the opportunity to compete for jobs in the federal competitive civil service;

2. Issue a writ of mandamus compelling defendants to accord plaintiffs and all others similarly situated their Constitutional and statutory rights to compete for jobs in the federal competitive civil service. The writ of mandamus should require, in part, that defendants submit a plan—within 30 days of the issuance of the writ—which will demonstrate how non-citizens will be recruited and employed in competitive federal civil service positions.

3. Issue a declaratory judgment, declaring that the rules and regulations, promulgated by the United States Civil Service Commission and all other federal agencies, which deny non-citizens the opportunity to compete for federal employment violate plaintiffs' Constitutional and statutory rights to equal opportunity to pursue such jobs.

4. Order such other and further relief as this Court may deem appropriate.

Dated: December 22, 1970.

WONG, SIEDMAN & LOWE,
STEPHEN M. LOWE,
EDWARD H. STEINMAN,

/s/ Stephen M. Lowe
By STEPHEN M. LOWE,

/s/ Edward H. Steinman
EDWARD H. STEINMAN,
Attorneys for Plaintiffs.

VERIFICATION

STATE OF CALIFORNIA,
City and County of San Franciso, ss:

We, MOW SUN WONG, SIU HUNG MOK, ANNA YU, SISTER FRANCENE LUM, and KAE CHEONG LUI, are the plaintiffs in the within entitled action; we have read the foregoing Complaint for Injunctive, Mandamus, and Declaratory Relief and know the contents thereof; and we certify that the same is true of our own knowledge, except as to those matters which are therein stated upon our information or belief, and as to those matters we believe it to be true.

MOW SUN WONG.
SIU HUNG MOK.
ANNA YU.
SISTER FRANCENE LUM.
KAE CHEONG LUI.

Subscribed and sworn to before me this 22nd day of December, 1970.

MAY A. CHANG,
Notary Public—California.
City and County of San Francisco.

My commission expires July 14, 1973.

EXHIBIT "A" TO THE COMPLAINT

PERSONAL QUALIFICATIONS STATEMENT

IMPORTANT

READ THE FOLLOWING INSTRUCTIONS CAREFULLY BEFORE FILLING OUT YOUR STATEMENT

All requested information must be furnished. The information you give will be used to determine your qualifications for employment.

It is IMPORTANT that you answer all questions on your Statement fully and accurately; failure to do so may delay its consideration and could mean loss of employment opportunities.

If an item does not apply to you, or if there is no information to be given, please write in the letters "N.A." for Not Applicable.

GENERAL INSTRUCTIONS

- Use typewriter if available. Otherwise, write legibly or print clearly in dark ink.
- If you are applying for a specific civil service examination, follow exactly the directions in the examination announcement as well as the instructions for filling out this form.
- For a written examination, the admission card tells you what to do with this Statement.
- If the examination involves no written test, mail this Statement to the office named in the examination announcement. Be sure to send to the same office any other forms required in the announcement.
- Notify the office with which you file this Statement of any change in your name or address.

INSTRUCTION RELATING TO SPECIFIC ITEMS

ITEM 10. LOWEST GRADE OR SALARY

- Enter the lowest grade OR the lowest salary you will accept. You will not be considered for any lower grade or salary; you will be considered for higher grades or salary. If you enter grade, do not enter salary.

ITEM 18. EXPERIENCE

- Take time to fill in these experience blocks carefully and completely. Your qualifications rating depends in a large part on your experience and employment history. Failure to give complete details may delay consideration of your Statement. Answers given in this item may be verified with former employers.
- When the block contains experience in more than one type of work (examples: carpentry and painting, or personnel and budget) estimate and indicate the approximate percentage of time spent in each type of work. Place these percentages in parentheses at the end of the description of the duties.
- *General Information*—If supervision over other employees was one of your duties, be sure to indicate the number and kind (and grades, if Federal Government) of employees supervised by you, and explain your duties as a supervisor under description of duties.
- Indicate in each block of Item 18 the name under which you were employed if it was different from the name in Item 4 of this Statement. Show former name in parentheses after "Description of Work."
- Use separate blocks if your duties, responsibilities, or salary level changed materially while working for the same employer. Treat each such change as a separate position.

PLEASE READ ADDITIONAL INSTRUCTIONS ON BACK OF THIS SHEET

ITEM 18. EXPERIENCE—(Continued)

- *Block 1*—Describe your present position in this block. Indicate in this block if you are now unemployed or if you have never been employed.
- *Blocks 2 and 3*—Describe in Block 2 the position you held just before your present position, and continue to work backwards using Block 3.
- *Need for additional blocks*—If you need more experience blocks, use Standard Form 171–A, Continuation Sheet, or a plain piece of paper. If you use plain paper, each experience block must contain all of the information requested in Item 18 of the printed Statement. If there is not enough space in any of the experience blocks to describe the positions held, continue the description on a plain piece of paper. Identify each plain sheet at the top by showing your name, birth date, examination or position title, and the block under Item 18 from which the description is continued. Attach these supplemental sheets to the top of page 3 at place marked, "Attach Supplemental Sheets or Forms Here."
- Include your military or merchant marine service in separate blocks in its proper order and describe major duty assignments.
- Experience acquired more than 15 years ago may be summarized in one block if it is not applicable to the type of position applied for.
- Account for periods of unemployment in separate blocks in order.
- Section 3311 of title 5, United States Code, provides that in examinations in which experience is a factor, credit will be granted for any pertinent religious, civic, welfare, service, and organizational activity which you have performed, either with or without compensation. You may, if you wish, report such experience at the end of your employment history if you feel that it represents qualifying experience for the position(s) for which you are applying. Show actual time spent in such activity.
- Indicate estimated number of hours worked per week in the space provided if you were on part-time work.

ITEM 23. ACTIVE MILITARY SERVICE AND VETERAN PREFERENCE

- Five-point preference is granted to veterans if they are honorably separated from the armed forces: (a) after active duty during the periods April 6, 1917, to July 2, 1921, or December 7, 1941, to July 1, 1955; (b) after more than 180 consecutive days of active duty after January 31, 1955 (not counting service under an initial period of active duty for training under the "6-month" Reserve or National Guard programs); or (c) after service in a campaign for which a campaign badge has been authorized.
- If you claim five-point preference, you are not required to furnish records to support your claim until the time of appointment.
- Ten-point preference is granted in some cases to disabled veterans, including veterans awarded the Purple Heart, to widows of veterans, to wives of disabled veterans, and to mothers of deceased or disabled veterans. See Standard Form 15, Claim for 10-Point Veteran Preference.
- If you claim ten-point preference, complete Standard Form 15 and attach it, together with the proof called for in that form, to this Statement.

ITEM 25. MEMBERSHIP IN ORGANIZATIONS

- Answer each part of this question carefully. Admitted past membership and participation in an organization of the type to which this question refers does not by itself disqualify you for Government employment. Consideration will be given to the nature of the organization, the extent of your participation, and any other relevant facts and circumstances.

ITEM 31. RELATIVES EMPLOYED BY THE UNITED STATES GOVERNMENT

- A Federal official (civilian or military) may not appoint any of his relatives or recommend them for appointment, and a relative who is appointed in violation of this restriction can not be paid. There are also restrictions on making a career or career-conditional appointment in the competitive service when a person is not entitled to veteran preference and two or more members of his family are already serving in the competitive service under a career or career-conditional appointment. Thus it is necessary to have information about your relatives who are working for the Government.

CERTIFICATION

- Be careful that you have answered all questions on your Statement correctly and considered all statements fully so that your eligibility can be decided on all the facts. Read the certification carefully before you sign and date your Statement.
- Sign your name in ink.
- Use one given name, initial or initials, and surname.

PLEASE DETACH THIS INSTRUCTION SHEET BEFORE SUBMITTING YOUR STATEMENT

553-034 O - 74 - 2

PERSONAL QUALIFICATIONS STATEMENT

Budget Bureau Approved 16-R010?

1a. Kind of position (job) you are filling for (or title of examination)

b. Announcement number

c. Options for which you wish to be considered (if listed in examination announcement)

d. Primary place(s) you wish to be employed

2. Home telephone — Area Code / Number

3. Business telephone — Area Code / Number

4. Name (Last) (First) (Middle) (Maiden, if any) ☐ Mr. ☐ Miss ☐ Mrs.

5. Number and street: R.D. or Post Office box number

6. City / State / ZIP Code

7. Birth date — Month / Day / Year

8. Social Security Number

9. If you are currently on a register of eligibles for appointment to a Federal position, give the name of the examining unit, the name of the office maintaining the register, the date on your notice of rating, and your rating.

10. Lowest pay or grade you will accept — PAY $ per / OR GRADE

11. Are you willing to travel? (Check one) — NO / SOME / OFTEN

12. When will you be available?

13. Will you accept — YES / NO

(A) Temporary appointment of — —1 month or less? / —1 to 6 months? / —6 to 12 months? / (B) Less than full time work? (Less than 40 hours per week)

(C) Will you accept a job in — —Washington, D.C.? / —any place in the United States? / —outside of the United States? / —only in (specify)

14. EDUCATION

(A) Did you graduate from high school, or will you graduate within the next nine months? YES / NO — MONTH/YEAR — HIGHEST GRADE COMPLETED

(B) Name and location (city and State) of last high school attended

(C) Name and location (city, State, and ZIP Code if known) of college or university. (If you expect to graduate within 9 months, give MONTH and year you expect degree.)

Dates attended From	To	Years completed Day	Night	Credits completed Semester hours	Quarter hours	Type of degree	Year of degree

(D) Chief undergraduate college subjects	Credits completed Semester hours	Quarter hours	(E) Chief graduate college subjects	Credits completed Semester hours	Quarter hours

(F) Major field of study at highest level of college work

(G) Other schools or training (for example, trade, vocational, armed forces, or business). Give for each the name and location (city, State, and ZIP Code if known) of school, dates attended, subjects studied, certificates, and any other pertinent data.

15. HONORS, AWARDS, AND FELLOWSHIPS RECEIVED

16. FOREIGN LANGUAGES

Enter foreign languages and indicate your knowledge of each by placing "X" in proper column.

	Reading Fair	Good	Excel	Speaking Fair	Good	Excel	Understanding Fair	Good	Excel	Writing Fair	Good	Excel

17. Special qualifications and skills (licenses, skill with machines, patents or inventions, publications — do not submit copies unless requested, public speaking, memberships in professional or scientific societies, hobbies or shorthand speed, etc.)

THE FEDERAL GOVERNMENT IS AN EQUAL OPPORTUNITY EMPLOYER

Standard Form 171 (Formerly SF 57)
July 1968 — U.S. Civil Service Commission

PLEASE BE SURE TO READ ATTACHED INSTRUCTIONS BEFORE COMPLETING ITEM 18

18. EXPERIENCE (Start with your PRESENT position and work back)

May inquiry be made of your present employer regarding your character, qualifications, and record of employment? YES / NO

1. Dates of employment (month, year) From / To PRESENT TIME — Exact title of position — If Federal service, classification series and grade

Salary or earnings Starting $ per / Present $ per — Avg. hrs. per week — Place of employment City / State — Number and kind of employees supervised — Kind of business or organization (name/stationery, accounting, insurance, etc.)

Name and title of immediate supervisor — Name of employer (firm, organization, etc.) and address (including ZIP Code, if known)

Area Code and phone No., if known

Reason for wanting to leave

Description of work

For agency use (civil rule, etc.)

2. Dates of employment (month, year) From / To — Exact title of position — If Federal service, classification series and grade

Salary or earnings Starting $ per / Final $ per — Avg. hrs. per week — Place of employment City / State — Number and kind of employees supervised — Kind of business or organization (name/stationery, accounting, insurance, etc.)

Name and title of immediate supervisor — Name of employer (firm, organization, etc.) and address (including ZIP Code, if known)

Area Code and phone No., if known

Reason for leaving

Description of work

For agency use (civil rule, etc.)

3. Dates of employment (month, year) From / To — Exact title of position — If Federal service, classification series and grade

Salary or earnings Starting $ per / Final $ per — Avg. hrs. per week — Place of employment City / State — Number and kind of employees supervised — Kind of business or organization (name/stationery, accounting, insurance, etc.)

Name and title of immediate supervisor — Name of employer (firm, organization, etc.) and address (including ZIP Code, if known)

Area Code and phone No., if known

Reason for leaving

Description of work

For agency use (civil rule, etc.)

(IF YOU NEED ADDITIONAL EXPERIENCE BLOCKS OF STANDARD FORM 171, USE PLAIN PAPER)

ATTACH SUPPLEMENTAL SHEETS OR FORMS HERE
Answer all questions correctly and fully

19. If you have ever been employed by the Federal government as a civilian, give your MOST RECENT: Grade	Job Title	20. Birth place: City; State (or foreign country)	21. Legal or voting residence (State)

22. REFERENCES. List three persons who are NOT related to you and who have definite knowledge of your qualifications and fitness for the position for which you are applying. Do not repeat names of supervisors listed under Item 18, EXPERIENCE.

Full Name	Present Business or Home Address (Number, street, city, State and ZIP Code)	Business or Occupation

23. VETERAN PREFERENCE. A. Have you ever served on active duty in the United States military service? (Exclude years of active duty for training as a member of a reserve unit.) — Yes / No

If "Yes," complete Items B through E below.

B. List for all active military service:

Dates (From–To)	Branch	Serial or Service Number

C. Have you ever been discharged from the armed services under other than honorable conditions? (You may also ask such discharge changed to honorable by a Discharge Review Board or similar authority.) — Yes / No

If "Yes," give details in Item 16.

D. Do you claim 5 points preference based on active duty in the armed forces? — Yes / No

If "Yes," you will be required to furnish records to support your claim at the time you are appointed.

E. Do you claim 10 points preference? — Yes / No

If "Yes," complete and attach Standard Form 15, "Claim for 10-point Veteran Preference," together with the proof called for in that form.

ANSWER ITEMS 24 THROUGH 33 BY PLACING AN "X" IN THE PROPER COLUMN	Yes	No
24. Are you a citizen of the United States? If "No," give country of which you are a citizen.		
25. Before answering this question read Item 25 in the attached instructions. A. Are you now, or within the last ten years have you been, a member of: (1) The Communist Party, U.S.A., or any subdivision of the Communist Party, U.S.A.? (2) An organization that to your present knowledge advocates the overthrow of the constitutional form of government of the United States by force or violence or other unlawful means? B. If your answer to Item A(1) or A(2) is "Yes," enter your answers to the following questions in Item 16 or on a separate piece of paper: (1) The name of the organization? (2) The dates of your membership? (3) Your understanding of the aims and purposes of the organization at the time of your membership?		
26. To ensure that you are not placed in a position which might impact your health, or which might be a hazard to you or to others, we need information about the following: Do you have, or have you had, heart disease, a nervous breakdown, epilepsy, tuberculosis, or diabetes? If your answer is "Yes," concerning any one of these, give details in Item 16.		
27. Within the last five years have you been fired from any job for any reason?		
28. Within the last five years have you quit a job after being notified that you would be fired? If your answer to 27 or 28 above is "Yes," give details in Item 16 (Also, the name and address (Incl. ZIP Code), if applicable, approximate date, and reason in each case. This information should agree with your answers in Item 18, EXPERIENCE.)		
29. Have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for any offense against the law? (You may omit: (1) traffic violations for which you paid a fine of $150.00 or less, and (2) any offense committed before your 21st birthday which was finally adjudicated in a juvenile court or under a Youth Offender law.)		
30. While in the military service were you ever convicted by general court martial? If your answer is 29 or 30 is "Yes," give details in Item 16. Show for each offense: (1) date, (2) charge, (3) place, (4) court, and (5) action taken.		
31A. Does the United States Government employ in a civilian capacity or as a member of the Armed Forces any relative of yours (by blood or marriage)? (See Item 31 on the attached instruction sheet.) B. Do you live with, or within the past 12 months have you lived with, any of these relatives who are employed in a civilian capacity? If your answer to A is "Yes," give in Item 16 for each relative: (1) full name, (2) present address (including ZIP Code), (3) relationship, (4) department, agency, or branch of the Armed Forces. If your answer to B is "Yes," also give the kind of appointment held by the relative(s) you live with or have lived with within the past 12 months.		
32. Do you receive or have you applied for retirement pay, pension, or other compensation based upon military or Federal civilian service? If your answer is "Yes," give details in Item 16.		
33. Are you an officer or employee of any State, territorial, county, or municipal government? If "Yes," give title of position or name of office, and location, in Item 16. Indicate whether elected or appointed.		

34. Space for detailed answers. Indicate Item numbers to which answers apply.

Item No.	

EXHIBIT "B" TO THE COMPLAINT

Special Delivery

October 19, 1970

Mr. Kae Cheong Lui
752 Vallejo Street
San Francisco, CA 94133

Dear Mr. Lui:

Your personnel records indicate that you are not a citizen of the United States. Therefore, it is necessary to terminate your services effective close of business October 20/1970 in accordance with the Postal Manual Regulations 711.531.

Sincerely yours,

/s/ Lim P. Lee
Lim P. Lee
Postmaster

/s/ T. R. White
By: T. R. White
Acting Chief,
Employment & Services

EXHIBIT "C" TO THE COMPLAINT

12563

Presidential Documents

Title 3—THE PRESIDENT

Executive Order 11478

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

BEST COPY AVAILABLE

SEC. 2. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of Federal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to promote that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

Richard Nixon

THE WHITE HOUSE,
August 8, 1969.

[F.R. Doc. 69-9430; Filed, Aug. 8, 1969; 4:24 p.m.]

BEST COPY AVAILABLE

Exhibit "D" to the Complaint

UNITED STATES CIVIL SERVICE COMMISSION,
Washington, D.C. 20415, September 18, 1970.

MR. L. LING-CHI WANG,
Co-Chairman, Coordinating Committee, Chinese for Affirmative Action 350 Union Street, Suite 309, San Francisco, California 94133

DEAR MR. WANG: I appreciate having this opportunity to comment on the citizenship requirement for Federal service in reply to your August 20, 1970, letter.

When considering employment of noncitizens in the Federal service, we draw a line between employment in the competitive civil service and other Federal employment. Generally speaking, appointments to positions in the competitive civil service are intended to lead to eventual career tenure, which entitles a person to receive all the rights and privileges granted by the Government to its career employees. It has been considered a just and equitable policy since the passage of the Civil Service Act of 1883 that such tenure in our country's Government be reserved for its citizens. The legislative history of the Act shows that Members of Congress repeatedly stated that applicants for civil service examinations must be citizens of the United States. Thus the Civil Service Regulations have always required applicants for competitive examination to be citizens.

We see nothing unreasonable or illegal in this long-established policy. Most, if not all, nations having sophisticated legal systems and large numbers of civil servants tend to regard government employment as a privilege restricted to citizens. When a lawfully admitted alien becomes a naturalized citizen, he is eligible to compete in civil service examinations and be considered for employment by the Federal Government in competitive positions on an equal basis with other citizens.

There are provisions, however, for eligible noncitizens to be employed in the Federal service when qualified citizens are not available or when agencies are filling positions excepted from the competitive civil service. A qualified noncitizen may be appointed in such a case if the agency is not prohibited from employing persons from his country. For many years most agencies have been prohibited by law from using their appropriated funds to employ noncitizens in the continental United States. But there are certain exceptions to the law. Some agen-

cies, such as the Department of Defense, are excepted from the prohibition. In addition, citizens of certain countries are also excepted. This exception includes nationals of countries allied with the United States in the current defense effort. Thus although a citizen of the Republic of China, for example, generally could not be appointed to a competitive position in the Federal service, he could be appointed to an excepted position for which he is qualified. In this connection, the Department of Commerce has authority to make excepted appointments of census enumerators, and thus it has been able to hire non-citizens for this purpose.

We appreciate that many competent Chinese aliens, as well as other resident aliens, have little chance to obtain Federal civil service jobs in the continental United States. Nevertheless, in light of the reasons for adoption of the long-standing policy on citizenship in the competitive civil service, we do not consider that it violates the principles of Executive Order 11478 on equal employment opportunity.

While I know I have not given you the kind of answer you sought, I hope I have given you some helpful background on the basis for our policy on citizenship.

Sincerely yours.

ROBERT E. HAMPTON,
Chairman.

By NICHOLAS J. OGANOVIC,
Executive Director.

[Caption Omitted]

Affidavit of Mow Sun Wong

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, MOW SUN WONG, being duly sworn, hereby depose and say:

1. I am a resident of San Francisco, California, presently residing at 462 Union Street. I am 38 years old. I came to the United States from Hong Kong in June of 1969.

2. Before I came to the United States, I had completed vocational school in China, where I was trained as an electrical engineer. I worked in that capacity for over 10 years.

3. When I came to the United States, I was only able to

obtain work as a grocery clerk. I remained as a grocery clerk for four months.

4. In February of 1970, I had the opportunity to learn English in a program sponsored by the Federal Manpower Development and Training Act. I thought that I would be more able to support my family if I learned English through this program.

5. On August 24, 1970, I began working under the California Supplemental Training and Education Program (STEP). The program provides training by placing the person in a job where he can learn skills to make him more employable.

6. Through this program, I was placed with the United States General Services Administration working as a janitor. My supervisor has informed me and my attorneys that my work has been execellent and that he would like to have me remain on the job.

7. Unfortunately, my supervisor has informed me that I am not eligible for this job because I am not a United States citizen and because federal laws prohibit the hiring of non-citizens in federal employment.

MOW SUN WONG.

Subscribed and sworn to before me this 18th day of December, 1970.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Caption Omitted]

Affidavit of Siu Hung Mok

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, SIU HUNG MOK, being duip sworn, hereby depose and say:

1. I am a resident of San Francisco, California. I arrived here from Macao in October of 1968.

2. Before I came to the United States, I had 18 years of experience as a businessman in both China and Macao.

3. Since my arrival in the United States, I have had various short-term jobs, such as a grocery clerk, a cook's helper, and working in a meat market.

4. In early 1970, I joined the classes in English given by the Manpower Development and Training Act Skill Center, a Center funded by federal monies. I have attended classes there regularly to improve my ability in English.

5. On August 8, 1970, I was placed with the Federal Records Center through the California Supplemental Training and Education Program (STEP). I was employed there as a file clerk.

6. My supervisor at the Federal Records Center, Stephen Chow, informed me that my work as a file clerk was fine, but that I could not be retained as a permanent employee of the Federal Records Center because I am not a citizen of the United States and because federal laws prohibit the hiring of non-citizens in federal employment.

SIU HUNG MOK.

Subscribed and sworn to before me this 18th day of December, 1970.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Caption Omitted]

Affidavit of Anna Yu

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, ANNA YU, being duly sworn, hereby depose and say:

1. I am a Chinese resident of San Francisco, California. I came to this country from Hong Kong in 1965.

2. I graduated from English High School in Hong Kong, studied for one year at Dominican College and graduated from the University of California, Berkeley, in September of 1969.

3. On or about October 8, 1970, I attempted to file an application to become a clerk typist with the federal government. I completed the Personal Qualification Statement and brought it to the Personnel Clerk at the Federal Office Building, 450 Golden Gate Avenue, San Francisco, California.

4. I was informed by that clerk that I had to be a citizen of the United States in order to take the typing test. That person also said there were no exceptions to this. The clerk also said

I could not appeal this action, since the laws of the United States do not allow non-citizens to work in competitive federal jobs.

ANNA YU.

Subscribed and sworn to before me this 18th day of December, 1970.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Caption Omitted]

Affidavit of Sister Francene Lum

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, SISTER FRANCENE LUM, being duly sworn, hereby depose and say:

1. I was born in Hankow, China, on March 18, 1918. I came to the United States in September 1946 and was admitted as a Sister of Loretto in 1947.

2. My educational background includes a Bachelor of Arts from Webster College, a Master in Education at St. Louis University, and periods of graduate study at Stanford, Johns Hopkins, University of Kansas and Seton Hall Universities.

3. I have 15 years experience as a teacher of mathematics and Chinese as a second language in high school.

4. Presently, I am teaching English as a second language to immigrants who are participants in the training program sponsored under the Manpower Development and Training Act. I have been working in this capacity for approximately 11 months.

5. On November 20, 1970 the California Department of Human Resources Development informed me that there was a position available as an evaluator of educational programs with the Department of Health, Education, and Welfare.

6. I attempted to pursue this opening, and arranged for an interview with Floyd Pierce, Regional Director of Civil Rights for the Department of Health, Education, and Welfare. He told me that in order to apply for any opening I would have to get a rating for that position.

7. I then called the Federal Job Information Center to see if I could be rated for a position. I was told that in order to be rated I would have to be a citizen of the United States.

8. Thus, despite my qualifications I have not been permitted to assume any position with the Department of Health, Education, and Welfare simply because I am not a citizen of the United States.

SISTER FRANCENE LUM.

Subscribed and sworn to before me this 18th day of December, 1970.

MAY A. CHANG,
Notary Public of California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Captioned Omitted]

Affidavit of Kae Cheong Lui

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, KAE CHEONG LUI, being duly sworn, hereby depose and say:

1. I am a Chinese resident of San Francisco, California. My immediate family includes my wife and our six children.

2. I was trained and employed as a scale-maker in China for two years.

3. Since I came to the United States in September of 1968, I have held various jobs, including work as a busboy and a dishwasher.

4. On October 9, 1970, I was able to obtain a job with the United States Post Office, loading and unloading mail. My work at this position was fine but on October 19, 1970, I was notified that my job was being terminated solely because I am not a citizen of the United States.

5. Since that time I have remained unemployed and have been forced to rely on welfare to support my family.

KAE CHEONG LUI.

Subscribed and sworn to before me this 18th day of December, 1970.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

GENERAL SERVICES ADMINISTRATION,
Region 9, 49 Fourth Street,
San Francisco, California 94103, December 18, 1970.

To Whom It May Concern:

I am a Custodial Force Supervisor of Public Buildings for the United States Government, General Services Administration in San Francisco, California. I have served as a Supervisor for nearly 30 years.

In August of 1970, Mr. MOW SUN WONG began working under my Supervision as a Laborer with the General Services Administration. Mr. WONG has been employed under the California Supplemental Training and Employment Program (STEP).

Since Mr. WONG began working under my Supervision, his performance has been outstanding. He has proved to be a most competent and fine employee and has been a most cooperative employee. His attendance has been excellent.

I would like very much to have Mr. WONG stay on as Laborer with the General Services Administration. However, due to the Federal Regulation against the employment of non-citizens, he will not be able to continue his employment after February 19, 1971.

/s/ John S. Verducci,
JOHN S. VERDUCCI,
Custodial Force Supervisor.

[Caption Omitted]

[Filed Feb. 25, 1971, C. C. Evensen, Clerk]

Amended Notice of Motion for Summary Judgment

TO THE DEFENDANTS and their attorneys, JAMES L. BROWNING, JR., U.S. ATTORNEY, and BRIAN B. DENTON, Assistant U.S. Attorney, 450 Golden Gate Avenue, San Francisco, California:

PLEASE TAKE NOTICE that the undersigned attorneys for the plaintiffs will make their Motion for Summary Judgment before the Honorable Robert F. Peckham, U.S. Court-House, 450 Golden Gate Avenue, San Francisco, California on

Friday, the 19th day of March, 1971 at 2:30 p.m, or as soon thereafter as motion may be heard rather than as previously scheduled for February 19, 1971.
Dated: February 24, 1971.

WONG, SIEDMAN & LOWE,
By /S/ Stephen M. Lowe
STEPHEN M. LOWE,
/S/ Edward H. Steinman
EDWARD H. STEINMAN.

[Caption Omitted]

[Filed Apr. 2, 1971, C. C. Evensen, Clerk]

Notice of Motion

To the Plaintiffs and their attorney: STEPHEN M. LOWE, Esq., WONG, STEIDMAN AND LOWE, 250 Columbus Avenue, San Francisco, California 94133.

PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants will make their Motion to Dismiss before the Honorable Robert F. Peckham, United States District Court, 450 Golden Gate Avenue, San Francisco, California, 94102, on the 16th day of April 1971, at 2:30 p.m., or as soon thereafter as this Motion may be heard, as that is the date and time set for hearing on Plaintiffs' Motion for Summary Judgment.

* * * * *

Motion to Dismiss

The undersigned attorneys, on behalf of the named Defendants, move this Honorable Court to dismiss the Complaint and action for lack of jurisdiction of the subject matter, and failure to state a claim upon which relief can be granted. This Motion is based upon the Reasons and Authorities hereinafter set forth.

Dated: April 2, 1971.

JAMES L. BROWNING, Jr.,
United States Attorney.

By BRIAN B. DENTON,
Assistant United States Attorney,
Attorneys for the Defendants.

[Caption Omitted]

Affidavit of Tom Tung Bor in Support of Plaintiffs' Motion for Summary Judgment

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, TOM TUNG BOR, being duly sworn, hereby depose and say:

1. I am a Chinese resident of San Francisco. I was born in Hong Kong in January 1948 and came to this country with my family in 1955.

2. I attended both elementary and secondary school in San Francisco, and on January 16, 1969 I was drafted into the United States Army. I served in the Army until August 20, 1970 at which time I received an honorable discharge.

3. During my 19 month service with the military, I achieved the rank of Sergeant E–5. I served 14 of those months in Korea.

4. Upon returning to the United States, I sought employment at both the United States Post Office and the United States Civil Service Commission. At both places, I was informed that the federal government would not hire me for any position, because I was not a citizen.

5. Since I have spent nearly two years in the military service of this country, I feel it is most unfair that I cannot work for the federal government. If the federal government deems me qualified and loyal enough to serve in its military, then I do not understand why I am not given the opportunity to be a qualified, loyal postal employee or the like.

6. Besides serving this country in the military, I also am a taxpayer and subject to other government requirements. For these reasons, I strongly agree with the plaintiffs in the above-entitled action that the federal restrictions against the employment of non-citizens are unconstitutional and unfair.

TOM TUNG BOR.

Subscribed and sworn to before me this 31st day of December, 1970.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Caption Omitted]

Affidavit of Yisung Lei in Support of Plaintiffs' Motion for Summary Judgment

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, YISUNG LEI, being duly swon, hereby depose and say:

1. I work and reside in the Chinatown area of San Francisco. I am not a citizen of the United States.

2. Before comnig to the United States in 1965, I studied and worked in Hong Kong. I received a Bachelor of Arts degree in history and English literature from the New Asian College in Hong Kong in 1954. Thereafter, I taught high school English in both Hong Kong and Malaysia.

3. Since coming to the United States, I have received a Master's degree in English from the College of Holy Name in Oakland in 1967. I have worked as a general laborer for Montgomery Ward, and also worked for a newspaper in Chinatown, the Chinese World. I am currently employed as a security trainee with the State of California Department of Human Resources Development in Chinatown.

4. On December 22, 1970—the date upon which the above-entitled action was filed—I went to the Federal Job Information Center at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. I went to apply for an engineering aide position with the federal government; since I have taken units in architectural drafting at Merritt College in Oakland I feel my educational background and experiences would qualify me for such a position.

5. Unfortunately, I was informed by Mrs. Roberts at the Federal Job Information Center that I would not be allowed to apply to take an examination for an engineering aide position, since I was not a citizen of the United States. Though I vigorously contended that this could not be so, she assured me that the law prohibited non-citizens like myself from even applying for such a job. When I asked to talk to her supervisor, she said there was no need for me to do so because the law was clear. She also told me that I could not appeal her decision, since the United States Civil Service laws explicitly denied me the right to apply for a federal position.

6. I have now learned that thousands of other non-citizens are faced with the same type of restrictions that confronted me at the Federal Job Information Center. Since most of us have the skills and experience necessary for federal employment, and since we are subject—like citizens—to paying taxes and other such requirements, I feel it is totally unfair for the federal government to deny me the right to apply for, let alone hold, federal employment.

7. Therefore, I am writing this affidavit to strongly support the efforts of the five plaintiffs in the instant matter, who are seeking to change these federal restrictions. Though the United States has encouraged and allowed me to file a declaration of intent to become a citizen, its own laws do not permit me to work for it. Such an unfair and inconsistent situation must be changed.

YISUNG LEI.

Subscribed and sworn to before me this 24th day of December, 1970.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Caption Omitted]

Affidavit of Mow Sun Wong in Support of Motion for Summary Judgment

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, MOW SUN WONG, being duly sworn, hereby depose and say:

1. I filed my Declaration of Intention to Become a Citizen in August, 1970 at San Francisco, California.

2. I hereby declare that I owe allegiance to the United States.

MOW SUN WONG.

Subscribed and sworn to before me this 4th day of June, 1971.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Caption Omitted]

Affidavit of Siu Hung Mok in Support of Motion for Summary Judgment

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, SIU HUNG MOK, being duly sworn, hereby depose and say:

1. I filed my Declaration of Intention to Become a Citizen in August, 1970 at San Francisco, California.

2. I hereby declare that I owe allegiance to the United States.

SIU HUNG MOK.

Subscribed and sworn to before me this 4th day of June, 1971.

MAY A. CHANG,
Notary Public, California,
City and County of San Francisco.

My commission expires July 14, 1973.

[Original filed Mar. 18, 1974; Clerk, U.S. Dist. Court, San Francisco]

In the United States District Court for the Northern District of California

No. C–70–2730–RFP

MOW SUNG WONG, ET AL., PLAINTIFFS

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., DEFENDANTS

Order

Pursuant to the remand of the United States Court of Appeals for the Ninth Circuit in WONG vs. HAMPTON, No. 72–1079 (January 25, 1974):

IT IS ORDERED that defendants, and each of them, and their successors, agents, and employees:

1. Be enjoined from continuing to deny plaintiffs and all others similarly situated the opportunity to compete for federal employment.

2. Within 30 days of the entry of this order defendants are ordered to show this Court all steps taken or to be taken to

implement the decision of the Ninth Circuit Court of Appeals referred to above.

3. Defendants' motion for stay of judgment is denied.

Approved as to form only:
/S/ BRIAN B. DENTON.
Dated: March 18, 1974.

/S/ ROBERT F. PECKMAN,
Judge of the District Court.

[Filed, Apr. 26, 1974; Clerk, U.S. Court of Appeals]

In the United States Court of Appeals for the Ninth Circuit

No. 72–1079

MOW SUN WONG, ET AL., APPELLANTS

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

Order

Before: WRIGHT and WALLACE, Circuit Judges:

The opinion herein was filed on January 25, 1974 and the judgment issued to the district court on February 14. Pending further order of this court, the mandate is recalled.

Dated:

[Filed May 21, 1974; Clerk, U.S. Dist. Court, San Francisco]

In the United States District Court for the Northern District of California

Civil No. C–70–2730–RFP

MOW SUNG WONG, ET AL., PLAINTIFFS

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., DEFENDANTS

Order

This matter came regularly on for hearing on May 6, 1974 at 10:00 a.m. before this Court for hearing on the status of the

Court's Order filed March 18, 1974 and upon Defendants' Motion to Vacate the Order of March 18, 1974. The Motion to Vacate, having been submitted to the Court both on the written record and based upon oral arguments, and the Court being fully advised in the premises, stayed its Order entered March 18, 1974 which was issued pursuant to the remand of the United States Court of Appeals for the Ninth Circuit in this cause, and therefore;

IT IS HEREBY ORDERED AND DECREED that:

The Court's Order of March 18, 1974 is hereby stayed until final disposition by the Supreme Court of this cause, for the reason that the United States Court of Appeals for the Ninth Circuit on April 26, 1974 issued an Order recalling its mandate issued to this Court on February 14, 1974.

Dated: May 15, 1974.

ROBERT F. PECKMAN,
United States District Judge.

Approved as to form only

SAN FRANCISCO NEIGHBORHOOD
LEGAL ASSISTANCE FOUNDATION
/S/ David C. Moon,
DAVID C. MOON,
Attorney for Plaintiffs.

Affidavit of Robert E. Hampton

In the Supreme Court of The United States

Affidavit in Support of Motion to Stay

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

MOW SUN WONG, ET AL., APPELLEES

Affidavit

Robert E. Hampton, first being duly sworn, deposes and says that he is the Chairman of the United States Civil Service Commission and that he makes this affidavit in support of the Government's Motion to Stay the Mandate of the United States Court of Appeals for the Ninth Circuit and the Order of the United States District Court for the Northern District of California issued in the above-captioned case.

On March 18, 1974, the United States District Court for the Northern District of California enjoined the Civil Service Commission from continuing to deny the respondents, and other resident aliens, the opportunity to compete for Federal employment. The court further ordered that within thirty days of the entry of its order, the Civil Service Commission show the court all steps taken or to be taken to implement the decision of the Ninth Circuit Court of Appeals. The order of the district court was made pursuant to the mandate of the Ninth Circuit Court of Appeals. The district court denied the Government's motion to stay its order and on April 17, 1974, the Ninth Circuit denied the Government's Motion to Stay or Withdraw its Mandate Pending Application for Certiorari and to Stay the Order of the District Court.

To comply with the order of the District Court enjoining the Commission from denying resident aliens the opportunity to compete for Federal employment, the Civil Service Commission instructed its Washington Area Office and its Regional Offices to accept and process to completion all applications received from resident aliens. Two hundred applications have been processed to completion through the week ending April 13, 1974. Anticipating that the Solicitor General would file a petition for a writ of certiorari and that the Government would be granted a stay of the judgment of the Ninth Circuit Court of Appeals, and concerned that, with certain exceptions, payments to noncitizens was prohibited by a provision in appropriations acts not stricken by either the district court or court of appeals, the Commission directed that resident alien applicants not be issued notices of rating or certified for appointment to positions in the competitive civil service.

Since the Government has been unsuccessful in obtaining the requested stays, it may now be necessary for the Commission to authorize agencies to appoint resident aliens into the competitive civil service in order to fully comply with the order of the district court. The only orderly manner in which their appointment can be accomplished is through a change in the Commission's regulations. However, the issuance of such regulations would be subject to retraction if the Supreme Court reversed the Ninth Circuit. The Commission would then be left with the dilemma of either permitting resident aliens to retain competitive positions to which they have already been appointed, in violation of the Commission's qualification stand-

ards, or separating them from employment. The latter course would be disruptive to the employee and to his agency.

The very process of issuing new regulations is time consuming and costly. Good management would dictate that the proposed regulations be submitted to the various affected departments and agencies of the Executive Branch for comment and expression of their views. After agency consultation, the Commission would review the comments of the departments and agencies and revise the proposed regulations, as appropriate. Issuance of new regulations requires their publication in the Federal Register, revision of the Title 5 of the Code of Federal Regulations, and revision of the instructional material published in the Commission's Federal Personnel Manual and the personnel manuals of each department and agency of Government affected by the regulations. We would also anticipate the devotion of numerous man hours by Commission and agency personnel in explaining, interpreting, and applying the new regulations. The need for explanation and interpretation is demonstrated by the many inquiries on the status of alien employment which the Commission has received since the decision of the Ninth Circuit Court of Appeals. These inquiries reflect a general state of confusion which may well have been aggravated by the inability of the Government to obtain a timely stay of the judgment of the Ninth Circuit.

The difficulty attending the issuance of new regulations is compounded in this instance by the need (1) to identify positions of a policy-making and sensitive nature for which, as the Ninth Circuit indicated, citizenship might remain a qualification under new regulations and (2) by the provision in annual appropriation acts referred to earlier. This provision places limitations on the authority of most Federal departments and agencies to pay aliens from appropriated funds. However, nationals of certain specified countries and countries allied with the United States in the current defense effort are exempt from the prohibition against payment of aliens. Additionally, certain agencies, such as the Department of Defense, are exempt completely from the prohibition in the appropriation acts, while others have partial exemptions for various types of positions or organizational units.

The status of the five respondents in the instant case illustrates the type of questions which might be encountered. They all allege that they are Chinese residents of the United States. One entered the United States in 1946, the other four in the

1960's. Of these four, two entered from Hong Kong, one from Macao and the other, presumably, from mainland China. Thus, determination of their present nationality may present a problem and, unless they fall within one of the exceptions from the prohibition against payment of noncitizens, they may be denied the benefits of the Ninth Circuit's decision in spite of any change in the Commission's regulations.

This is not to say that the problems engendered by these added complications are insurmountable, but their resolution will add to the time and money expended, perhaps unnecessarily, to issue and apply new regulations. Moreover, any resolution will be tentative until the Supreme Court disposes, in some manner, of the Government's petition for a writ of certiorari and I am concerned that in the interim the status of the alien applicant for Federal employment will remain clouded and uncertain to the detriment of both the alien and the Government.

/S/ Robert E. Hampton
ROBERT E. HAMPTON,
Chairman,
United States Civil Service Commission.

Subscribed and sworn to before me this 24th day of April, 1974 in the City of Washington, District of Columbia.

VIOLET L. DEE,
Notary Public.

My Commission expires Feb. 28, 1977.

Supreme Court of the United States

No. 73–1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATE CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 10, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents MOW SUN WONG; SIU HUNG MOK; SISTER FRANCENE LUM; and KAE CHEONG LUI, individually on their own behalf and on behalf of all those similarly situated, ask leave to file the attached Brief In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondents' affidavits in support of this motion are attached hereto.

Dated: May 15, 1974.

Respectfully submitted,

EDWARD H. STEINMAN
School of Law
University of Santa Clara
Santa Clara, CA 95053

DAVID C. MOON
Chinatown-North Beach Office
San Francisco Neighborhood
Legal Assistance Foundation
250 Columbus Avenue
San Francisco, CA 94133

By _____
DAVID C. MOON
Attorneys for Petitioners

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5633

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

AFFIDAVIT

I, MOW SUN WONG, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by the U.S. District Court for the Northern District of California.

Mow Sun Wong
MOW SUN WONG

Duly witnessed and sworn to before me, a Notary Public, this 14 day of May, 1974.

Joe M. Chan
Notary Public

OFFICIAL SEAL
JOE M. CHAN
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires April 26, 1976

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5630

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No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

AFFIDAVIT

I, SIU HUNG MOK, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by both the District Court and the Ninth Circuit Court of Appeals.

Siu Hung Mok
SIU HUNG MOK

Duly witnessed and sworn to before me, a Notary Public, this 15th day of May, 1974.

Joe M. Chan
Notary Public

OFFICIAL SEAL
JOE M. CHAN
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires April 26, 1976

CHINATOWN-NORTH BEACH
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

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No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

AFFIDAVIT

I, SISTER FRANCENE LUM, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my/poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by the U.S. District Court for the Northern District of California.

Duly witnessed and sworn to before me, a Notary Public, this_____day of May, 1974.

SISTER FRANCENE LUM

Notary Public

MAY A. CHANG
NOTARY PUBLIC-CALIFORNIA
My Commission Expires July 14, 1977

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5630

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

RECEIVED

AFFIDAVIT OF DORIS YUE

I, DORIS YUE, being duly sworn, depose and say:

1. I am a secretary for the Chinatown Office of the San Francisco Neighborhood Legal Assistance Foundation, a legal services program funded by the United States Office of Economic Opportunity.

2. I speak and comprehend both the English language and Chinese languages, including Cantonese and its various dialects.

3. I translated the respective Affidavits in Support of Motion to Proceed In Forma Pauperis in the above-entitled action from the English language into the Chinese dialect, which is the native language of respondents MOW SUN WONG, SIU HUNG MOK and KAE CHEONG LUI, completely and accurately prior to the execution of the respective Affidavits by MOW SUN WONG, SIU HUNG MOK and KAE CHEONG LUI respectively.

Duly witnessed and sworn to before me, a Notary Public, this 15th day of May, 1974.

DORIS YUE

Notary Public

MAY A. CHANG
NOTARY PUBLIC-CALIFORNIA
My Commission Expires July 14, 1977

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5630

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

AFFIDAVIT

I, KAE CHEONG LUI, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by both the District Court and the Ninth Circuit Court of Appeals.

Duly witnessed and sworn to before me, a Notary Public this 13th day of May, 1974.

Kae Cheong Lui
KAE CHEONG LUI

May A. Chang
Notary Public

MAY A. CHANG
NOTARY PUBLIC - CALIFORNIA
My Commission Expires July 14, 1977

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5630

Supreme Court, U. S.
FILED
MAY 21 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al.,

Petitioners,

vs.

MOW SUN WONG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Attorneys for Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al.,

Petitioners,

vs.

MOW SUN WONG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported; it appears in Appendix A, pp. 1a-23a, of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit [hereinafter referred to as "Petition"]. The opinion of the United States District Court (Petition, App. B, pp. 24a-35a) is reported at 333 F.Supp. 527.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, p. 2.

QUESTIONS PRESENTED

1. Whether a regulation of the United States Civil Service Commission, which bars resident aliens from employment in the federal competitive civil service, violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. Whether a regulation of the United States Civil Service Commission, which bars resident aliens from employment in the federal competitive civil service, exceeds the authority provided by Congressional statutes and contravenes Executive Order 11,478, issued by the President of the United States.

CONSTITUTIONAL, STATUTORY, REGULATORY, AND EXECUTIVE ORDER PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the federal Civil Service Act, the federal Civil Service Commission regulations, and the Presidential Executive Order are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE

Respondents brought the instant lawsuit in December of 1970 to enjoin the United States Civil Service Commission from enforcing a regulation[1/] which automatically prohibited them--solely because of their status as resident aliens--from applying for, let alone holding, any competitive civil service positions. Though each respondent[2/] had been admitted into the United States as a permanent resident alien, the

---

1/ 5 C.F.R. §338.101 of the Civil Service Commission's regulations (reprinted at p. 3 of the Petition).

2/ The four respondents in this action are Mow Sun Wong, Siu Hung Mok, Francene Lum, and Kae Cheong Lui.

regulation foreclosed them from even attempting to submit an application for federal employment. Though each respondent possessed the qualifications required for the positions of janitor, file clerk, educational evaluator, and mail clerk respectively, the regulation denied them any opportunity to utilize those abilities in federal civil service jobs.

The backgrounds and employment experiences of the respondents alone demonstrate why the United States Court of Appeals for the Ninth Circuit found that no "compelling interest or proper government objective [exists] to justify the total exclusion of aliens from the federal competitive civil service." (Petition, App. A, p. 19a). Before coming to the United States, respondent MOW SUN WONG had worked as an electrical engineer for over 10 years. After entering this country as a resident alien, respondent WONG began working in August of 1970 under the California Supplemental Training and Education Program (STEP). Through this program, which provides on-the-job training for its participants, respondent WONG was actually placed with a federal agency, the United States General Services Administration, to work as a janitor[3/]. According to his supervisor, respondent WONG performed "excellently" in this federal job and his supervisor wished to hire him for a permanent federal position. Nevertheless, once the STEP program ended, respondent WONG was not even given an opportunity to compete for this janitorial position on any basis, since the regulation automatically prohibited the hiring of non-citizens in such federal employment.

3/ The salaries of participants in the STEP project are paid by the California State job training program.

A similar dilemma confronted respondent SIU HUNG MOK. Before his arrival in the United States, he had 18 years of experience as a businessman in both China and Macao. He also participated in the STEP project and was placed with a federal agency--as a file clerk with the Federal Records Center. His supervisor similarly found his work with the federal agency most satisfactory. Yet, solely because of his alien status, respondent MOK was not allowed to be retained as a file clerk with the Federal Records Center after his STEP training program ended.

The alien status of respondent FRANCENE LUM was likewise the sole reason why she was denied the opportunity to even apply for a position as an evaluator of educational programs with the United States Department of Health, Education, and Welfare. Respondent LUM's educational background includes a bachelor of arts degree from Webster College, a master's in education degree from St. Louis University, and periods of graduate study at Stanford, Johns Hopkins, Kansas, and Seton Hall Universities. At the time the instant action was instituted, she had 15 years experience as a teacher of mathematics and of Chinese as a second language in high school, and was then teaching English as a second language to immigrants participating in a Manpower Development and Training Act project. Yet, despite these impressive qualifications, she too was foreclosed from seeking any positions with the federal government because she was not a citizen.

Finally, as the experience of respondent KAE CHONG LUI shows, aliens are not even permitted to keep federal jobs if they should accidently maanage to obtain such positions. Respondent CHEONG was accepted and worked satisfactorily for the United States Post Office loading and unloading mail. Yet, when the federal agency discovered two weeks

after his hiring that he was not a citizen, he was summarily terminated from the job solely for that reason.

In their Complaint, respondents contended that the regulation which foreclosed them from the federal competitive civil service violated the Due Process Clause of the Fifth Amendment and contravened Executive Order No. 11478[4/] and the Public Works Appropriation Act of 1970.[5/] In the memorandum and order issued on August 30, 1971 (Petition, App. B), the United States District Court rejected each of respondents' contentions and ruled on behalf of petitioners. On appeal, the United States Court of Appeals reversed (Petition, App. A), holding that the regulation violated the Due Process Clause of the Fifth Amendment. Finding "[t]he broad sweep [of the regulation] is the vice" (App. A, p. 23a), the Court of Appeals ruled that no "compelling government interest" or "logical or persuasive reason [has been] advanced as to why aliens should be excluded from all federal civil service employment." Ibid.

Subsequent to the Court of Appeals decision, and prior to the filing of the instant Petition for a Writ of Certiorari, the United States District Court, on March 18, 1974, enjoined the petitioners from continuing to deny respondents and other resident aliens the opportunity to compete for federal employment. Pursuant to this order, the United States Civil Service Commission accepted and processed 200 applications from resident aliens seeking federal employment.[6/]

4/ 34 Fed. Reg. 12985 (Aug. 8, 1969) (reprinted in Petition, App. A, pp. 7a-10a, n. 8).

5/ Public Works Appropriation Act, 1970, Pub. L. No. 91-144, 83 Stat. 323, 336 (Dec. 11, 1969) (reprinted in Petition, pp. 4-5, n. 3).

6/ See Affidavit of Robert E. Hampton in Support of Motion to Stay, p. 2, accompanying Petitioners' Application for Stay in the instant case (filed on April 26, 1974, with the Supreme Court of the United States.

Such acceptance and processing have now ceased, pending disposition of the instant Petition for a Writ of Certiorari.

ARGUMENT

Given the changes that the Court of Appeals' decision below will cause in the operation of the United States Civil Service, it would be disingenuous for respondents to deny the importance of that decision. Yet, respondents strongly contend that the Petition for a Writ of Certiorari be rejected, since the decision below falls clearly within this Court's opinion last term in Sugarman v. Dougall, 93 S.Ct. 2842 (1973). Petitioners openly recognize that Sugarman holds that state and local governments may not deny resident aliens the right to apply for and hold positions in their respective competitive civil service systems. Petition, pp. 6-7. Yet, petitioners claim that the federal government has the constitutional right to discriminate against aliens in the operation of its competitive civil service system. As the decision below carefully demonstrated--and as this Brief in Opposition will reaffirm--the Constitution of the United States contains no exception which exempts the federal government from adhering to its requirements.

I.

THERE IS NO CONFLICT OF DECISIONS.

Petitioners contend that the decision of the Court of Appeals below conflicts both with a long-followed policy of the federal Civil Service Commission and with the statutory authorization for such policy. Petition, p. 7. Yet, the existence of a conflicting administrative interpretation or possible Congressional sanction does not rise to a "conflict of decisions" to which this Court gives great weight in deciding whether to grant a petition for a writ of

certiorari. In fact, there is complete agreement in the decisions[7] of the only two United States Courts of Appeals which have examined the discriminatory federal regulation, 5 C.F.R. § 338.101, concerning the proper standard of judicial scrutiny to be applied in determining the constitutionality of that regulation. In the instant case, petitioners have consistently contended that the constitutionality of the regulation should be measured by the general "rational basis" standard of review. E.g., Petition, p. 9. The decision of the Court of Appeals below rejected this contention [8] and instead subjected the discriminatory regulation to the most rigid test of judicial scrutiny, requiring

> the Government [to] establish a compelling interest or proper government objective to justify the total exclusion of aliens from the federal competitive civil service.
>
> Wong v. Hampton, supra (Petition App. A, p. 19a)

Similarly, in Jalil v. Hampton--the only other decision to consider the constitutionality of 5 C.F.R. § 338.101--the court recognized that since classifications based on alienage are suspect, the government must justify the discriminatory regulation on the grounds of a "special" and compelling governmental interest.[9] Though the disposition of the Jalil case meant that the constitutional question was

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7/ Wong v. Hampton, ___ F.2d ___ (Jan. 25, 1974), cert. filed, ___ U.S. ___ (April 24, 1974); Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), cert. den., 93 S.Ct. 112 (1972).

8/ The Court of Appeals did recognize that respondents made "a strong argument for finding that even under the less onerous general rational relationship standard, the government fails to satisfy its burden." Wong v. Hampton, supra (Petition, App. A, p. 19a, n. 15).

9/ 460 F.2d 923, 929 (D.C. Cir. 1972).

not reached,[10] a dissenting opinion did reach that issue and found the regulation violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States.[11]

II.

THE DECISION BELOW IS CLEARLY CORRECT.

In striking down the federal regulation barring aliens from the federal competitive civil service, the court below employed the approach taken by this Court in both Sugarman v. Dougall, supra, and Graham v. Richardson, 403 U.S. 365 (1971). The lower court first ruled--based on the Sugarman and Graham decisions--that respondents are members of "a 'suspect' class. . . because aliens 'are a prime example of a discrete and insular minority.'" Wong v. Hampton, supra (Petition, App. A, p. 15a). Since the federal regulation classifies on the basis of such alienage, the court below then subjected the regulation "'to close judicial scrutiny'" to see if the discrimination could be justified. Ibid. And, as in the two Supreme Court cases, the Court of Appeals found "no logical or persuasive reason advanced as to why aliens should be excluded from all federal civil service employment." Id. at p. 23a.

Though the reasoning process utilized by the court below exactly paralleled that taken by this Court in both Sugarman and Graham, petitioners nevertheless find fault with each step of the approach. They first suggest

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10/ Since there were no findings of fact in the district court's order, the Court of Appeals in Jalil remanded the case to the trial court to decide the non-constitutional questions. 460 F.2d at 927-928. In the instant case, findings of fact were made and the non-constitutional questions were decided. See Wong v. Hampton, supra (Petition, App. A, p. 18a).

11/ 460 F.2d at 930, 931 (dissenting opinion).

that resident aliens like respondents should not be accorded special treatment since "[a] lienage--unlike race, color, or national origin--is not a permanent 'status,' but a temporary condition." Petition, p. 9. Such a statement totally contradicts the explicit holdings of this Court that aliens are a "suspect class" entitled to close judicial scrutiny. E.g., Sugarman v. Dougall, supra, 93 S.Ct. at 2847; Graham v. Richardson, supra 403 U.S. at 372. Regardless of their permanent or temporary condition,[12] aliens possess the "traditional indicia of suspectness" which require the invocation of strict judicial scrutiny. San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278, 1294 (1973). They fall directly within the ambit of this special judicial protection because, as this court explained in Rodriguez, they are members of a class

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.
>
> Ibid.[13]

12/ It is interesting to note that each of the four named appellees in the Sugarman case had lived in this country more than five years, which meant they qualified for naturalization as citizens under 8 U.S.C. § 1427(a). Sugarman v. Dougall, supra, 93 S.Ct. at 2845. Yet, the fact that none of these resident aliens chose to exercise their option to become citizens did not alter this Court's findings that they were members of a "suspect class" who deserved close judicial scrutiny.

13/ Petitioners claim that none of the court decisions concerning aliens has accorded them "a constitutionally protected right to federal civil service employment." Petition, p. 9. Such a statement, however, completely confuses the issue decided by the court below. Respondents do not claim a right to federal employment, but an equal opportunity to apply for and hold such employment based on their qualifications and not on their alien status. As the Court of Appeals correctly stated:

> The issue before this Court on appeal is whether the United States Civil Service Commission may, consistent with the Fifth

(footnote continued)

Petitioners then contend that because the "national government, unlike the states, exercises plenary authority over aliens," its regulation should not be subjected to close judicial scrutiny, but instead must satisfy only the rational basis standard. Petition, p. 8. Such a contention, in essence, suggests that Congress can ignore the Constitution--and the requirement of close judicial scrutiny for aliens subjected to discriminatory laws--because it has "plenary authority" over aliens. Yet, the existence of "plenary authority over some matters is no substitute for constitutional protections and requirements. As the court below clearly found:

> To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits.
>
> Wong v. Hampton, supra, (Petition, App. A, pp. 12a-13a)

Not surprisingly, the two cases[14] cited by petitioners in support of their "plenary" power contention (Petition, pp. 8-9) reveal that such authority does not justify the invocation of any lesser judicial scrutiny for respondents. These cases deal with matters of entry, deportation, and foreign relations--the judicial contexts in which the proposition of "plenary" powers has been stated. In such

---

(footnote 13 continued)

> Amendment's due process guarantee, exclude [respondents] and all other resident aliens from obtaining employment in the federal competitive civil service [solely because of their alienage].
>
> Wong v. Hampton, supra, (Petition, App. A, pp. 3a-4a)

14/ Harisiades v. Shaughnessy, 342 U.S. 580 (1951); Johnson v. Eisentrager, 339 U.S. 763 (1950).

situations, issues of foreign affairs, national security, and sovereignty are inevitably intertwined.

> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.
>
> Harisiades v. Shaughnessy, 342 U.S. 580, 587-588 (1951) (emphasis added)

As the court below found (Petition, App. A, pp. 21a-22a), the paramount issues of this country's sovereignty and security are not present in the instant case. Rather, the court below merely granted respondents the opportunity to apply to and work for the federal government in any position where their skills could be utilized. The factors which give Congress great latitude in questions of entry and deportation are simply not germane to a resident alien's employment goals. Thus, whatever judicial deference is accorded Congress' exercise of "plenary power" in areas of foreign affairs or the entry and deportation of aliens has no application to the instant case.

Finally, petitioners intimate support for their "plenary power" rationale by distinguishing Sugarman v. Dougall, in which this Court struck down a New York statute denying aliens the right to hold positions in that state's competitive civil service. Petitioners claim the vice of the New York exclusion was that "it reached beyond the legitimate interests of New York as a sovereign political community." Petition, p. 8. Such vice, they contend, is not present in the instant case since the "Federal Government possesses national sovereignty." Ibid.

Ironically, this very issue of New York "reach[ing] beyond [its own] legitimate interests" was explicitly not decided by this Court in Sugarman. This Court held that the

New York statute violated Constitutional guarantees of equal protection because it "denies all aliens the right to hold positions in New York's competitive civil service." 93 S.Ct. 2842, 2849 (1973). Since the Sugarman case was decided on this constitutional basis, this Court said

> we need not reach the issue whether the citizenship restriction is in conflict with Congress' comprehensive regulation of immigration and naturalization.
>
> Id. at 2850[15/]

There is thus no support in either law or logic that the federal government's "plenary power" over aliens eliminates or lessens petitioners' Constitutional burden of demonstrating a compelling and substantial reason why respondents should be automatically excluded from seeking federal employment. As the court below found, none of the possible "justifications" which can be conjured up to support the regulation rises to the level of justifying its discrimination based on alienage. Wong v. Hampton, supra (Petition, App. A, pp. 19a-23a). Apparently, petitioners concur with almost all of these findings of the court below. In their petition, they offer only one possible government interest to justify the admitted discrimination--that an alien has "a foreign call on his loyalities." Petition, p. 8. Admittedly, factors

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15/ In cases where this Court has reached the issue of a conflict between federal and state laws, it has upheld the national power to regulate immigration as an alternative holding to finding the state laws unconstitutional. E.g., Graham v. Richardson, 403 U.S. 365, 375 (1971) ("An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny ... ") (emphasis added); Takahashi v. Fish & Game Comm., 334 U.S. 410 (1948).

of "loyalty" and security make federal government employment different from most employment situations. As the court below found, there may be certain employment positions in the federal civil service where concerns for loyalty and security foreclose aliens from seeking or holding those jobs. Wong v. Hampton, supra (Petition, App. A, p. 21a). Unfortunately, the regulation challenged in the instant case sweeps over all employment positions, regardless of these factors.

> [T]he Commission regulations fail to delineate any specific positions where security, loyalty and policy-making require that the citizenship requirement be essential for employment. Instead, they automatically exclude all aliens from the competitive civil service.
>
> Id. at pp. 21a-22a

Since the regulation explicitly discriminates against resident aliens and since no compelling or persuasive reason justifies such discrimination, the decision of the court below is clearly correct.

CONCLUSION

For the reasons stated in this Brief in Opposition, respondents respectfully submit that the Petition for a Writ of Certiorari be denied.

Date: May 15, 1974

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No. 73-1596

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a-23a) is not yet reported. The opinion of the district court (Pet. App. B 24a-35a) is reported at 333 F. Supp. 527.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 36a) was entered on January 25, 1974. The petition for a writ of certiorari was filed on April 24, 1974, and was granted on June 10, 1974 (A. 39). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Service Commission's regulation generally limiting employment in the federal competitive civil service to citizens and other persons owing permanent allegiance to the United States is within the constitutional powers of Congress and the President and hence not a constitutionally forbidden discrimination against aliens.

CONSTITUTIONAL PROVISIONS, STATUTE, EXECUTIVE ORDER, AND REGULATION INVOLVED

1. Article I, Sec. 8, cl. 4, of the Constitution of the United States provides:

> The Congress shall have Power * * * [t]o establish a uniform Rule of Naturalization * * *.

2. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

3. Section 1753 of the Revised Statutes, 16 Stat. 514, and Section 2 of the Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 3301, provide in pertinent part as follows:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

4. Executive Order No. 10577, 19 Fed. Reg. 7521 (November 22, 1954), provides in pertinent part:

> By virtue of the authority vested in me by the Constitution, by Section 1753 of the Revised Statutes (5 U.S.C. 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), by section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:
>
> * * * *
>
> Sec. 2.1. * * * (a) * * * The [Civil Service] Commission is authorized to establish standards, with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

5. Section 338.101 of the Civil Service Commission's regulations, 5 C.F.R. 338.101, provides in pertinent part:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a non-citizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chap-

ter, unless the appointment is prohibited by statute.

STATEMENT

Respondents, all aliens, instituted this class action on December 22, 1970, in the United States District Court for the Northern District of California, on behalf of themselves and "all other non-citizens of the United States who are similarly situated," challenging the validity of the Civil Service Commission's regulation (5 C.F.R. 338.101) requiring that applicants for most positions in the competitive civil service be citizens of the United States or persons owing permanent allegiance to the United States (A. 3-14).[1]

Respondent Mow Sun Wong was informed that he was ineligible for permanent employment as a janitor with the General Services Administration because of his alienage (A. 25).[2] Respondent Siu Hung Mok was informed that he was ineligible for permanent employment as a file clerk with GSA because of his

[1] In addition to citizens, non-citizen nationals also owe permanent allegience to the United States. 8 U.S.C. 1101(a)(21), (22), 1408. Non-citizen nationals are generally natives of insular or outlying possessions of the United States but, due to the extension of citizenship in some instances and the grant of independence in others, there are now relatively few non-citizen nationals (see p. 81, *infra*, n. 67). See generally 2 Gordon & Rosenfield, ***Immigration Law and Procedure*** ¶ 11.3b (1974 rev. ed.).

[2] Mow Sun Wong immigrated to the United States from Hong Kong in June 1969 (A. 24). At the time this action was instituted he was employed by the California Supplemental Training and Employment Program ("STEP"), having been assigned under that program in August 1970 to receive training as a janitor with GSA (A. 5, 7, 25). His employment under STEP was scheduled to terminate in February 1971 (A. 5). He filed a declaration of intent to become a citizen of the United States in August 1970 (A. 4, 33).

Prior to enactment of the Immigration and Nationality Act of 1952, aliens seeking naturalization as United States citizens were in certain cases required to file a declaration of intent to become a citizen, a requirement dating from 1795. 1 Stat. 414, as amended, 8 U.S.C. (1946 ed.) 731. Since various rights and privileges of aliens under both federal law (see, *e.g.*, p. 45, *infra*, n. 34) and state law (*e.g.*, *Terrace* v. *Thompson*, 263 U.S. 197) depend upon whether an alien has filed such a declaration, the practice of accepting such declarations has been continued by the 1952 Act (8 U.S.C. 1445(f)), even though the declaration is optional and has no operative significance for the purposes of that Act. See 1 Gordon & Rosenfield, *supra*, ¶ 1.34b, at 1-120, n. 11; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 82; S. Rep. No. 1137, 82d Cong., 2d Sess., p. 44.

alienage (A. 26).[3] Respondent Francene Lum sought a position as an evaluator of educational programs in the Department of Health, Education and Welfare in November 1970 (A. 27), but was informed by the Federal Job Information Center that she did not qualify for a rating test due to her alienage (A. 8, 28).[4]

[3] Siu Hung Mok immigrated to the United States from Macao in October 1968 (A. 25), and filed a declaration of intent to become a citizen in August 1970 (A. 5, 34). He was employed by the California STEP program (A. 7, 26), and in August 1970 was placed with GSA's Federal Records Center to receive training as a file clerk (A. 26).

[4] Francene Lum came to the United States from China in September 1946 (A. 27), and apparently has never filed a declaration of intent to become a citizen or sought naturalization. She has attended college and universities in this

Respondent Kae Cheong Lui was hired by the former Post Office Department for a brief period in 1970 to load and unload mail, but his employment was terminated when the postal authorities learned that he was not a citizen (A. 20, 28).[5] Also a plaintiff, but not a respondent here because she did not appeal, was Anna Yu, who sought a position as a clerk typist with the federal government but was informed she could not take the typing test because she was not a citizen (A. 8, 26-27).[6]

Asserting a "constitutional right to have the opportunity to be employed in a competitive Federal Civil Service position" (A. 4), respondents allege in

country and has taught high school for some fifteen years (*ibid.*).

[5] Kae Cheong Lui came to the United States from China in September 1968 (A. 28), but apparently has never filed a declaration of intent to become a citizen.

Under the Postal Reorganization Act (84 Stat. 719, 39 U.S.C. 101, *et seq.*), the United States Postal Service replaced the Post Office Department. Under Section 410 of the Act, which became effective on April 13, 1971, the Civil Service Act and the regulations promulgated thereunder by the Civil Service Commission do not apply to the Postal Service. Under existing regulations of the Postal Service, permanent resident aliens are no longer disqualified from most lower and middle level positions in the Service. Sec. 317.3, *Personnel Handbook P-11*, U.S. Postal Service, as amended on May 2, 1974 (*Postal Bulletin*, May 2, 1974, p. 2).

[6] Anna Yu came to the United States in 1965 from Hong Kong (A. 26), and apparently has never filed a declaration of intent to become a citizen or sought naturalization. She has attended college and university in this country (A. 7-8, 26).

their complaint: *first*, that the regulation discriminates against them arbitrarily and irrationally on the basis of alienage, and denies them "their rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment" (A. 4, 10-11); and, *second*, that the regulation denies them rights under Executive Order No. 11,478, which bans discrimination in federal employment on the basis, *inter alia*, of "national origin" (A. 4, 12-13).[7] Later, without formally amending their complaint, respondents urged in the district court that the regulation also contravenes Section 502 of the Public Works Appropriation Act, 1970.[8] Named as defendants were

[7] The complaint also alleged that the limitation constitutes an impermissible discrimination on grounds of "national origin," in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, concerning federally-assisted programs (A. 4, 12), but Section 601 is inapplicable to direct federal employment, and this claim was not pursued.

[8] That Act (83 Stat. 323, 336-337) prohibits, with certain exceptions, the payment of salary of any employee of the United States whose post of duty is in the continental United States—

> [U]nless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence * * *.

Respondents Mow Sun Wong and Siu Hung Mok filed affidavits in support of their motion for summary judgment declaring that they owe allegience to the United States (A. 33-34). The other respondents have made no such declaration.

the Chairman and the Commissioners of the United States Civil Service Commission, petitioners here, and other government officials.[9]

The complaint sought: (1) an injunction "preventing defendants and all other federal agencies from continuing to deny [them] * * * the opportunity to compete for jobs in the federal competitive civil service;" (2) a writ of mandamus compelling the defendants to submit for court approval a plan for the recruitment and employment of non-citizens in the competitive federal civil service; and (3) a declaratory judgment "that the rules and regulations, promulgated by the United States Civil Service Commission and all other federal agencies, which deny non-citizens the opportunity to compete for federal employment violate * * * [respondents'] Constitutional and statutory rights to equal opportunity to pursue such jobs" (A. 13).

Prior to answer, respondents moved for summary judgment (A. 29-30), and petitioners moved to dis-

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[9] The other defendants below were the Executive Director of the Commission, its Regional Director in San Francisco, the Administrator of the General Services Administration and its Regional Administrator in San Francisco, the Secretary of the Department of Health, Education and Welfare and that Department's Regional Director in the San Francisco area, and the former Postmaster General, along with two regional officers of the former Post Office Department (A. 3, 5-6). None of these defendants has any responsibility for the establishment of standards that applicants for federal civil service employment must meet, and accordingly they did not join in the petition for a writ of certiorari. They will, of course, be governed by any ruling made here.

miss the action on the ground, among others, that the complaint failed to state a claim upon which relief could be granted (A. 30).

In a memorandum opinion and order issued on August 30, 1971 (Pet. App. B 24a-35a), the district court denied respondents' motion, granted petitioners' motion, and ordered the complaint dismissed.

The court held that Section 338.101 of the Commission's regulations did not conflict with the Appropriations Act or the Executive Order (Pet. App. B 28a-31a). The court rejected respondents' Fifth Amendment equal protection claim, holding that the correct standard of scrutiny for the regulation is the rational-basis test: "It is quite rational and reasonable for the Executive, via a grant of power from the Legislature, to determine that the formation of policy and its execution, at whatever level, should be entrusted only to United States citizens." The court perceived as well an alternative rational basis: "[T]he Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens" (*id.* at 31a-34a). The court made no determination whether the action was properly maintainable as a class action, and hence did not define the class putatively represented by respondents.

The court of appeals reversed in an opinion issued January 25, 1974 (Pet. App. A 1a-23a). After deciding that the regulation is within the statutory authority of the Commission and not in conflict with the Appropriation Act or the Executive Order (*id.* at 4a-12a), the court declared the regulation unconsti-

tutional. Relying on this Court's decisions in *Sugarman* v. *Dougall*, 413 U.S. 634, and *Graham* v. *Richardson*, 403 U.S. 365, the court proceeded on the premise that "[a]liens are a 'suspect' class • • •" (Pet. App. A 15a) and that "classifications based on alienage are 'subject to close judicial scrutiny'" (*ibid.*), being justifiable only by "a compelling government interest" (*id.* at 22a). The court declared that Section 338.101 of the Commission's regulations unreasonably discriminates against resident aliens based solely on their status as aliens (Pet. App. A 23a) and that "no logical or persuasive reason [had been] advanced as to why aliens should be excluded from all federal civil service employment" (*ibid.*), and concluded that "in the fact situation of this case and with the broad sweep of the regulation involved, we hold that it is so unjustifiable as to be violative of due process" (*ibid.*).

The court of appeals remanded the case with instructions to grant the injunctive relief sought by respondents (*id.* at 23a). Pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, the mandate of the court of appeals issued 21 days after the court's decision. Before the Solicitor General had determined to seek review of the decision by this Court, the district court denied the government's application for a stay and on March 18, 1974, enjoined the petitioners "from continuing to deny • • • [the respondents] and all others similarly situated the opportunity to compete for federal employment" (though no class action determination had yet been made) and ordered petitioners to show to the court

within 30 days "all steps taken or to be taken to implement the decision of the Ninth Circuit Court of Appeals" (A. 34-35). Upon being informed that the Solicitor General had filed a petition for a writ of certiorari, the court of appeals, on April 26, 1974, recalled its mandate (A. 35). The district court by order of May 15, 1974, stayed its order of March 18 (A. 35-36). This Court granted certiorari on June 10, 1974 (A. 39).

ARGUMENT

INTRODUCTION AND SUMMARY

The central issue in this case concerns the constitutional power of the federal government to require citizenship as a general qualification for employment in the competitive federal civil service. The court of appeals adjudged the citizenship requirement invalid on the ground that the federal government lacks such power because of the equal protection component of the Fifth Amendment's Due Process Clause. Respondents will presumably seek to sustain the judgment of the court of appeals on the alternative grounds, rejected by both courts below, that the challenged regulation also exceeds the authority provided by, or conflicts with, the relevant statutes and executive order. The core of the case, however, is the constitutional issue. Before proceeding to a more detailed analysis of that issue, we think it useful to outline certain aspects of the government's position.

A. The regulation requiring citizenship as a qualification for federal employment is supported by the

combined powers of the President and the Congress. This Court has frequently recognized that Congress has broad powers to deal with the special status of aliens as part of its plenary power over immigration and naturalization conferred by Article I, Sec. 8, cl. 4, of the Constitution. *E.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580. The President also has powers concerning the status of alienage, as an incident to his constitutional responsibilities both with respect to foreign affairs and national defense and as Chief Executive. Also, the President and Congress may deal with alienage under their shared treaty-making power.

Here Congress has delegated powers to the President and the President has delegated the aspect of his own powers relevant to aliens and federal employment, plus those received from Congress, to the Civil Service Commission. The Commission's regulation thus comes before the Court with the maximum constitutional support the Executive and the Legislature can give. *C. & S. Air Lines, Inc.* v. *Waterman Corp.*, 333 U.S. 103, 109-110.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. * * * If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. [*Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 635-637 (Jackson, J., concurring).]

However, while the challenged regulations are supported by the vast powers of both Congress and the President, we believe that they may be sustained solely by reference to the power of Congress, so that the case does not require delineation of the perimeters of Presidential power in this area.

B. The Constitution vests in Congress the authority to determine national policy with respect to immigration and naturalization, *i.e.*, the power to establish the conditions under which aliens may enter and remain in this country. Those policy determinations are essentially political in nature and "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 589. If Congress wishes to permit or encourage certain types of immigration and to prohibit or discourage others, it has the plenary power to do so, just as it has the power to encourage or discourage aliens in the United States with respect to becoming naturalized citizens.

For example, if it were so inclined because of national or international economic or political problems or other reasons, Congress presumably could amend the immigration and nationality laws to prohibit further immigration and to require that all aliens leave the country. Less drastically, Congress could provide that aliens may enter or remain in this country only if they refrain from seeking employment (cf. 8 U.S.C. 1182(a)(7),(15)), or from seeking specified types of employment, such as fed-

eral civil service employment (cf. 8 U.S.C. 1182(a)(12), (14)), and that they are subject to deportation if such limitations are not obeyed. Cf. 8 U.S.C. 1251(a)(9).

Federal government employment and the payroll it generates have been recognized as tools to be used in implementing national policies with respect to economic and social problems, and Congress is surely entitled to exercise its plenary powers concerning immigration, naturalization and aliens—powers that a state does not have[10]—in such a fashion to implement such national policies. It cannot seriously be suggested that any law to that effect would be beyond the constitutional powers of Congress, at least where the limitation does not contravene a specific constitutional prohibition, such as the First Amendment.

Surely, then, a less drastic or comprehensive measure having a comparable tendency would be no less valid. The regulation challenged here, which generally excludes aliens from employment in the federal competitive civil service, is such a provision. Having been in effect in one form or another for more than 90 years, the limitation is part of the package of conditions voluntarily accepted by all aliens who have chosen to enter and reside in this country. Yet, should it be violated,[11] neither deportation nor any other sanction is imposed upon the alien.

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[10] Compare *Sugarman* v. *Dougall*, 413 U.S. 634, 643-645.

[11] For example, one of the respondents was briefly employed in a position for which he was later determined to be ineligible due to his alienage (see p. 6, *supra*).

To favor citizens over aliens in this manner is not inherently invidious, for aliens have a variety of advantages and immunities that citizens lack (*e.g.*, *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 585-587), just as citizens have privileges and immunities under the Constitution that aliens lack. As in *Harisiades*, the exercise of federal power over the status of aliens often "bristles with severities" (342 U.S. at 587) much greater than the relatively mild and, if the alien wishes it so, temporary incapacity involved here. Through our history Congress has enacted hundreds of laws making numerous distinctions between the rights, privileges and duties of citizens and those of various categories of aliens (see the Appendix to this Brief). Such laws are interrelated in diverse ways and degrees with foreign affairs.

C. A determination of the powers of the federal government concerning the status of alienage may have important implications for the conduct of our foreign relations, including the power to negotiate effectively concerning the status of Americans who travel or reside as aliens in foreign countries. The rights of aliens are for that reason a frequent subject of the treaty-making power. The mechanical application of equal protection standards governing classifications according to race would go far to eliminate the legal differences between the status of citizens and of aliens, a result that is itself inconsistent with the Constitution, and would as an incident weaken our negotiating position in attempting to protect American citizens abroad.

D. The federal government's limitation on employment of non-citizens in the competitive civil service is further supported by the consistent practice of our government and thus has that warrant conferred by history and long usage. Speaking of the challenged federal power to create a national bank, Chief Justice Marshall put this point well (*McCulloch* v. *Maryland*, 4 Wheat. 316, 401):

> It has been truly said that, this can scarcely be considered an open question, entirely unprejudiced by the former proceedings of the nation respecting it. * * *
>
> It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.

Since Chief Justice Marshall's observation, this Court has repeatedly given weight to historical practice in resolving constitutional issues. *E.g.*, *McGautha* v. *California*, 402 U.S. 183, 203; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 677-680.

From the beginning of our history Congress has emphasized allegiance, which is the core of citizenship, as a qualification for federal employment. Thus,

the first statute enacted by Congress required all officers of the United States to take an oath to support the Constitution (1 Stat. 24, as amended. 5 U.S.C. 3331). When Congress legislated in 1883 about federal employment by establishing the present civil service, the legislative history shows that Congress intended and assumed that citizenship could be made a requirement for employment. The first Civil Service Rules, promulgated by President Arthur in 1883, required a statement by the applicant of his citizenship, and the Commission's first report to Congress in 1884 made it clear that citizenship was a necessary qualification. Thus Congress and the President have intended that the competitive civil service ordinarily be confined to citizens, and have known that it was so confined, from the inception of the system almost a century ago.

E. The rationality of a citizenship requirement for federal employment can hardly be doubted. Citizenship is based upon the concept of allegiance. If allegiance continues to be a meaningful concept in our law as well as in our national life, Congress and the President, for a variety of reasons, may properly require citizenship for federal employment.

All western nations impose a similar requirement for governmental employment, and, though we have made no comprehensive survey of the world, it seems probable that almost every nation follows a similar practice. This fact alone makes it difficult to say that the requirement is irrational.

There are intensely practical reasons for the requirement. Allegiance, shown by citizenship, may certainly be made a qualification for very many types of federal jobs (cf. *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 647-649), particularly in view of the diverse sensitive responsibilities of the federal government concerning national defense, foreign relations, and other matters. Also, Congress may justifiably choose to coordinate the exercise of its powers concerning immigration and the national economy and the general welfare and use the federal payroll to serve domestic social policies by favoring employment of citizens. Finally, as we show below (see pp. 66-71, *infra*), there are substantial administrative difficulties in attempting to implement a citizenship requirement on a more refined basis.

These practical considerations aside, citizenship requirement reflects symbolic reasons of great importance to the cohesion of our political community. As this Court has stated, "[c]itizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry." *Afroyim* v. *Rusk*, 387 U.S. 253, 268. "This Government was born of its citizens, it maintains itself in a continuing relationship with them * * *." *Perez* v. *Brownell*, 356 U.S. 44, 64 (Warren, C.J., dissenting). "[T]he citizens themselves are sovereign * * *." *Id.* at 65.

It is understandable, in this regard, that most persons, like most nations, might believe that the permanent civil service of their nation should be staffed

by persons who owe the nation allegiance, either by birth or by their decision to be naturalized. Such symbolic factors are important in national life and are not to be denigrated merely because they may not be demonstrably "rational" in a narrow, quantitative, or utilitarian sense.

F. The undoubted existence of a plenary power, rooted in the constitutional prerogatives of the Congress and the President, means that this case is not comparable to cases in which state laws with respect to aliens have been held to violate the equal protection clause of the Fourteenth Amendment. See *Graham* v. *Richardson*, 403 U.S. 365; *Sugarman* v. *Dougall*, 413 U.S. 634; *In re Griffiths*, 413 U.S. 717.

In weighing the concept of equal protection against federal power, it should also be noted that the Civil Service Commission regulation in question places a relatively minor burden upon aliens. They are generally disqualified for the federal competitive civil service, but not for the overwhelming majority of jobs in the American economy. In most cases, the burden of disqualification is, moreover, only a temporary one, if the alien wishes it so. Unlike race or sex, alienage is a category that the individual may leave. In this country, an alien lawfully admitted for permanent residence is eligible for naturalization after five years (three if married to a citizen). The temporary nature of the disqualification is emphasized by the fact that each of the respondents in this case

has now resided in the United States long enough to be eligible for citizenship and hence for the employment sought. Indeed, two of the plaintiffs were apparently eligible at the time they filed this lawsuit, respondent Francene Lum now having lived in this country 28 years and plaintiff Anna Yu nine years, though neither had become a citizen.

G. Nor does the Civil Service regulation offend the conscience. It is the rule, not only historically in America, but contemporaneously throughout the world.

A practice of government so rooted in the combined constitutional powers of the Congress and the President, in history and usage, and in practical considerations that commend themselves to perhaps all civilized nations ought not be struck down by the analytically sterile and simplistic observation that alienage is a "suspect" classification and that any rule with respect to it requires justification by a compelling governmental interest. That formulation, in this context, takes no account of almost all of the relevant constitutional factors.

Given the relevant considerations, application of equal protection principles requires a far more sophisticated analysis than the court of appeals provided. Its sweeping conceptualism overlooks the complexities in the relationship of aliens to the nation (as opposed to a state) which this Court stressed in *Harisiades*, *supra*, 342 U.S. at 585-586, in which, by

perpetuating "a dual status as an American inhabitant but foreign citizen," an alien "may claim protection against our Government unavailable to the citizen," "retains immunities from burdens which the citizen must shoulder," and "leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect."

The Constitution may be color-blind; as regards the federal government, however, it is not and never has been blind to the difference between citizenship and alienage, or allegiance and non-allegiance.

H. The Commission's regulation is not impermissibly broad in scope. A number of different lines might have been drawn concerning either the categories of aliens eligible for civil service employment, or the departments or positions for which they might be ineligible. That the regulation applies broadly, however, is no more a ground for invalidating it than was the breadth of the applicability of restrictions on political activity of federal employees recently sustained in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548.

In their challenge to the application of the Commission's regulation to aliens in their position and to the jobs that they seek, respondents are ultimately asking this Court to "strike a different balance" (*id.* at 564) than the one struck by Congress and the Executive Branch. That balance, however, "is sustainable by the obviously important interests sought

to be served by the [challenged] limitations * * *." *Ibid.*

Recognizing the unique legal status of aliens, who derive legal protection from both international law and domestic law, Congress has made varied judgments in extending the benefits of citizens to aliens throughout our history. The requirements challenged here are thus part of a longstanding and widespread pattern of federal differentiation between citizens and aliens. A holding that such requirements are beyond the federal government's power or are overly broad would threaten the validity of hundreds of provisions of the United States Code.

I. The background and legislative history of the Pendleton Civil Service Act of 1883 (22 Stat. 403), which established the present Civil Service Commission, demonstrate that Congress intended to authorize the Commission to limit employment of non-citizens in the civil service even though the civil service laws themselves do not contain any explicit citizenship requirement. The original rules of the Commission adopted by President Arthur in 1883 limited entrance to the competitive civil service to citizens, and a similar citizenship requirement has been part of the Commission's regulations ever since.

Congress has been well-aware of the Commission's limitations on employment of non-citizens in the civil service. Indeed, Congress has since 1938 included in appropriation acts broad statutory prohibitions on the payment of funds to non-citizen employees of the

United States. The court of appeals correctly found that the regulations were within the authority granted by Congress.

J. As this Court held in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, and *Morton* v. *Mancari*, No. 72-362, decided June 17, 1974, the term "national origin," as used in executive orders and statutes prohibiting discrimination on that basis, does not include alienage, and, as the court of appeals properly held, a requirement of United States citizenship is not inconsistent with such prohibitions.

I. GENERAL LIMITATION OF THE EMPLOYMENT OF ALIENS IN THE FEDERAL COMPETITIVE CIVIL SERVICE IS NOT BEYOND THE CONSTITUTIONAL POWER OF THE FEDERAL GOVERNMENT.

In holding that the Civil Service regulation generally limiting employment in the federal competitive civil service to citizens and others owing permanent allegiance to the United States was authorized by Congress and the President but was unconstitutional, the court of appeals has held in effect that such a limitation is totally beyond the constitutional powers of the United States—Congress and the President combined. That conclusion was reached—erroneously, we submit—as a result of an inappropriate application of standards pertaining to the constitutionality of state laws relating to alienage and of a failure to consider constitutionally relevant factors such as the unique legal status of aliens, the explicit constitutional pref-

erences for citizens, the constitutional prerogatives of Congress and the President, the distinctive responsibilities of the federal civil service, the long history of the challenged limitation, and the apparently universal similar practices of other nations.

A. Equal Protection Principles Do Not Control This Case.

It is now settled that the equal protection principle, when applicable, restricts federal governmental action by virtue of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533, n.5. But that proposition does not resolve this case. The threshhold question always is whether the particular action involved is one to which equal protection analysis is relevant.

Obviously enough, there are areas subject to federal regulation with respect to which no one would claim that equal protection principles apply. These include instances where the Constitution itself confers plenary power upon Congress or the President. Thus, no treaty could be challenged on the ground that it discriminates against one group of foreign nationals resident here, or against citizens. Nor could a congressional appropriation in favor of residents of the District of Columbia, or of a Territory, be attacked as denying equal treatment to other citizens of the United States. So, also, aliens cannot complain because, unlike citizens, they are made subject to deportation. Our primary submission is that the decision to limit employment of noncitizens in the federal competitive civil service is likewise a matter beyond the reach of the equal protection principle.

1. *The Legal Status Of Aliens Is Unique.*

Aliens in this country, like Indians, occupy a "unique legal status * * * of long standing," with respect to federal employment and other matters. *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip op. pp. 16, 19.

Unlike such characteristics as race and national origin, alienage is neither a highly visible nor an "immutable" or "unalterable" trait (cf. *Johnson* v. *Robison*, 415 U.S. 361, 375, n. 14); *Lindsey* v. *Normet*, 405 U.S. 56, 73), but is a legal condition imposed by domestic and international law, denoting a person's lack of permanent attachment to the people and to the government of a nation.[12] The condition

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[12] The term "alien" is defined in the Immigration and Nationality Act of 1952 as "any person not a citizen or national of the United States." 8 U.S.C. 1101(a)(3). "[N]ational of the United States" means "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. 1101(a)(22). See p. 4, *supra*, n. 1. Under international law, nationality involves a firm and permanent bond with a body politic. As was stated by the International Court of Justice in the *Nottebohm Case* (*Lichtenstein* v. *Guatemala*) [1955] I.C.J. Rep. 4, 23:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, inter-

is subject to change in most cases by action of the alien. Upon acquiring citizenship, the alien's former status becomes immaterial for most purposes. See *Schneider* v. *Rusk*, 377 U.S. 163.

An alien may enjoy "such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution * * *." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585. The Court in *Harisiades* described the a unique legal status of aliens as follows (*id.* at 585-586; footnotes omitted):

> So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. * * *
>
> The alien retains immunities from burdens which the citizen must shoulder. By withholding

ests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

> his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They cannot, consistently with our international commitments, be compelled "to take part in the operations of war directed against their own country." In addition to such general immunities they may enjoy particular treaty privileges.[13]

An alien is, of course, a "person" within the meaning of the Fifth Amendment (*e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228, 238; cf. *Russian Fleet* v. *United States*, 282 U.S. 481, 489) and the Fourteenth Amendment (*e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Truax* v. *Raich*, 239 U.S. 33, 39; *Takahashi* v. *Fish Comm'n*, 334 U.S. 410, 419), but this does not mean that all legal distinctions between citizens and aliens are constitutionally barred. The Constitution itself grants numerous rights to the former that are withheld from the latter. See *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 651-652 (Rehnquist, J., dissenting).[14] And, in general, "[u]nder

[13] Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 64-65. See generally Roth, *The Minimum Standard of International Law Applied to Aliens* (1949).

[14] Indeed, because they were apprehensive about the possibility of alien influence in the affairs of the national government, the Framers wrote into the Constitution explicit provisions concerning the citizenship of the President (Art.

our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 586 (footnotes omitted).

2. *The Constitution Authorizes Preferred Treatment For Citizens.*

"Citizenship is no light trifle * * *." *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 267. It "occupies a preferred position in our written Constitution * * *." *Perez* v. *Brownell*, *supra*, 356 U.S. at 84 (Douglas, J., dissenting). "Citizenship *is* man's basic right for it is nothing less than the right to have rights." *Id.* at 64 (Warren, C.J., dissenting; emphasis in original). It, "alone, assures him the full enjoyment of the precious rights conferred by our Constitution." *Id.* at 78.

We have just noted provisions of the original Constitution which restrict the highest federal offices to citizens (p. 27, *supra*, n.14). Those are not special exceptions to a general rule that places citizens and aliens constitutionally on the same footing. On the contrary, Section 1 of the Fourteenth Amendment itself—the fountainhead of the equal protection principle—demonstrates that there is a fundamental constitutional difference between citizens and aliens

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II, Sec. 1, cl. 5: natural born citizen), Senators (Art. I, Sec. 3, cl. 3; citizen for nine years), and members of the House of Representatives (Art. I, Sec. 2, cl. 2; citizen for seven years). See generally 2 Farrand, *The Records of the Federal Convention of 1787*, at 235, *et seq.*, 268 *et seq.* (1966 rev. ed.).

which, in many respects, justifies disparate treatment.[15]

Indeed, as Mr. Justice Rehnquist pointed out, dissenting, in *Sugarman*, 413 U. S. at 652, the Amendment explicitly distinguishes between the special privileges of "citizens of the United States" and immunities appertaining to all "persons." The states may abridge neither, but that does not eliminate the difference between the two categories of rights. Nor, of course, has this Court, in *Sugarman* or any other case, purported to revise the constitutional understanding. What the Privileges and Immunities Clause necessarily implies is that certain rights belong only to citizens, and it would make nonsense of the Amendment to hold that those citizenship rights must be shared with aliens by virtue of the Due Process and Equal Protection Clauses. See *Bradwell* v. *The State*, 16 Wall. 130, 138.[16] See also *Slaughter-House Cases*, 16 Wall. 36, 74.

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[15] See also the Fifteenth Amendment which, in terms, protects only "citizens of the United States," and Section 2 of the Fourteenth Amendment, which imposes a reapportionment penalty on states that restrict the elective franchise only when "citizens of the United States" (otherwise qualified by age, gender, residence and absence of criminal conviction) are adversely affected.

[16] In *Bradwell*, the Court commented (16 Wall. at 138):

> In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them * * *.

Certainly, that was the view of those who framed the Fourteenth Amendment. The Thirty-Ninth Congress expressly confined the benefits of the Civil Rights Act of 1866 to citizens. 14 Stat. 27.[17] And, in succeeding years, the most radical legislators of the Reconstruction era, implementing, as they thought, the Privileges and Immunities Clause, continued to define rights enjoyed by citizens alone. See, *e.g.*, Enforcement Act of 1870, 16 Stat. 140 (except only secs. 16 and 17, 16 Stat. 144); Civil Rights Act of March 1, 1875, 18 Stat. 335. It never occurred to these contemporaries of the Fourteenth Amendment, that the equal protection principle compelled them to include aliens when they declared the "civil rights of citizens." To be sure, they felt *free* to extend the benefit to aliens, as Section 17 of the Enforcement Act of 1870 (16 Stat. 144, as amended, 18 U.S.C. 242) sufficiently attests.[18] See also Section

[17] While the Civil Rights Act of 1866 was enacted by the very same members who framed the Fourteenth Amendment, it was of course premised on the *Thirteenth* Amendment, not the Fourteenth (which was not ratified until 1868). But, as this Court has repeatedly noted, the 1866 Act was an attempt to achieve the same end and was expressly re-enacted as Fourteenth Amendment legislation by Section 18 of the Enforcement Act of 1870, 16 Stat. at 144. See, *e.g.*, *Civil Rights Cases*, 109 U.S. 3, 22; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Buchanan* v. *Warley*, 245 U.S. 60, 78-79; *Oyama* v. *California*, 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U.S. 1, 10-11; *Hurd* v. *Hodge*, 334 U.S. 24, 32-33; *Takahashi* v. *Fish Comm'n*, 334 U.S. 410, 419-420.

[18] The original provision, like its current successor (18 U.S.C. 242), *expressly* protects *aliens* only from discriminatory "punishment, pains or penalties." Presumably, however, aliens were meant to be embraced by the term "inhabitant of any State or Territory" and, therefore, also to enjoy the protection of the criminal law with respect to the other rights mentioned earlier in the section. See *United States* v. *Classic*, 313 U.S. 299, 326-328, n. 10. Originally, these were restricted to what is encompassed by the following language in Section 16 of the 1870 Act (now 42 U.S.C. 1981): "the same right * * * to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens" and the right to be "subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other." It was only in 1874 that the Revisers, apparently going beyond their mandate, expanded the provision so as to include all rights embraced by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as substantive "federal rights." See *United States* v. *Price*, 383 U.S. 787, 802-803; *Screws* v. *United States*, 325 U.S. 91, 98-100 (opinion of Douglas, J.); *id.* at 120-125 (opinion of Rutledge, J.). For a convenient tabular history of 18 U.S.C. 242, including all earlier texts, see the Appendix to the opinion of Mr. Justice Frankfurter in *United States* v. *Williams*, 341 U.S. 70, 83.

16 of the 1870 Act[19] and the Ku Klux Act of April

[19] As originally enacted, this section contained two distinct provisions. The second, which has not survived, prohibited the states from imposing any greater "tax or charge" on one group of incoming aliens than was imposed on aliens immigrating from other countries. More important is the first provision which, in all material respects, is now codified as 42 U.S.C. 1981. See p. 30, *supra*, n. 18. The rights enumerated—being *some* of those declared for citizens only by Section 1 of the Civil Rights of 1866—were extended to "all persons within the jurisdiction of the United States." This ambiguous term has been held to include at least resident aliens not enjoying diplomatic immunity. *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695-696; *Takahashi* v. *Fish Comm'n.*, *supra*, 334 U.S. at 419.

20, 1871, 17 Stat. 13.[20] But that was viewed as a matter of legislative discretion, not constitutional imperative, and it was done selectively. Thus, much of what remains of these Reconstruction measures still excludes aliens from protective coverage. See 18 U.S.C. 241 (sustained and applied from *Ex parte Yarbrough*, 110 U.S. 651, in 1884 through *Anderson*

[20] In its central provisions, the 1871 Act apparently extended its protection to aliens. Section 1 (the predecessor of 42 U.S.C. 1983 and 28 U.S.C. 1343(3)) afforded civil remedies to "any person within the jurisdiction of the United States" for any deprivation, under color of law, of rights "secured by the Constitution." As with 18 U.S.C. 242 (see p. 30, *supra*, n. 18), the 1874 Revision expanded the rights covered without changing the beneficiaries. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543, n. 7. Section 2 of the Act, in its most important part, offered both criminal protection and civil relief to "any person or any class of persons" whose right to "equal protection of the laws" or whose "equal privileges or immunities under the laws" were threatened by a conspiracy. In the Revised Statutes, the criminal and civil provisions—otherwise substantively unchanged—were severed, and the first was struck down as unconstitutional in *United States* v. *Harris*, 106 U.S. 629. In confirming that ruling in *Baldwin* v. *Franks*, 120 U.S. 678, 684-690, the Court expressly assumed that the section was intended to protect aliens as well as citizens. The civil counterpart, which survives as 42 U.S.C. 1985(3), was recently construed in *Griffin* v. *Breckenridge*, 403 U.S. 88. Finally, Section 3 of the 1871 Act, in part, authorizes the President to use armed force to suppress a conspiracy that the state is unable or unwilling to control and that so hinders the execution of law that "any portion or class of the people of such State" is deprived of any right "named in the Constitution and secured by this act." Again, the 1874 Revision arguably expanded the rights protected by substituting, for the last phrase of the original, "secured by law." The provision is now 10 U.S.C. 333. See *Alabama* v. *United States*, 373 U.S. 545.

v. *United States*, No. 73-346, decided June 3, 1974); 18 U.S.C. 243 (upheld in *Ex parte Virginia*, 100 U.S. 339); 42 U.S.C. 1971(a)(1) (applied in *Louisiana* v. *United States*, 380 U.S. 145); 42 U.S.C. 1982 (applied in *Hurd* v. *Hodge*, 334 U.S. 24, and more recently construed in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409).[21]

We need not inquire whether the legislators of the Reconstruction decade always drew the right lines. It is familiar history that this Court struck down much of their work as straying beyond constitutional boundaries and, until very recently, gave a very restricted reading to what survived. It may well be that the Congress of that day indulged too expansive a notion of "privileges and immunities" of national citizenship—apparently deemed synonymous with "civil rights" [22]—or that it wrongly assumed power to add new privileges instead of merely protecting those that the Constitution itself established. We do not rely on any such congressional claim. But we are entitled to draw this much at least from legislation so close to the Fourteenth Amendment: (1) that there is a discrete category of privileges and im-

[21] There are also provisions which, although reaching both categories of civil rights, expressly recognize that some are confined to citizens while others are enjoyed by all "persons." *E.g.*, 28 U.S.C. 1343(3) (recently construed in *Lynch* v. *Household Finance Corp.*, *supra*; 28 U.S.C. 1443(1) (applied in *Georgia* v. *Rachel*, 384 U.S. 780); 42 U.S.C. 1983 (recently construed in *Adickes* v. *Kress & Co.*, 398 U.S. 144); 42 U.S.C. 1985(3) (applied in *Griffin* v. *Breckenridge*, *supra*).

[22] See *Oregon* v. *Mitchell*, 400 U.S. 112, 163-164 (opinion of Harlan, J.).

munities of national citizenship; (2) that neither the Equal Protection Clause of the Fourteenth Amendment, nor any comparable principle operating against the federal government, *requires* that such privileges be shared with aliens; (3) but that Congress *may*, if it chooses, extend those privileges to aliens.

The first two propositions are self-evident. This Court, however conservative in confining the list, has consistently acknowledged that privileges of national citizenship exist. See *Slaughter-House Cases*, *supra*, 16 Wall. at 74; *Bradwell* v. *The State*, *supra*, 16 Wall. at 138; *United States* v. *Reese*, 92 U.S. 214, 217-218; *United States* v. *Cruikshank*, 92 U.S. 542, 552, 555-556; *In re Kemmler*, 136 U.S. 436, 448; *Twining* v. *New Jersey*, 211 U.S. 78, 93-99; *Hague* v. *C.I.O.*, 307 U.S. 496, 513-514 (opinion of Roberts, J.); *id.* at 519-522 (opinion of Stone, J.); *Madden* v. *Kentucky*, 309 U.S. 83 90-93; *Griffin* v. *Breckenridge*, *supra*, 403 U.S. at 106. And it has at least ~~v. *Kentucky*, 309 U.S. 83, 90-93; *Griffin* v. *Brecken-*~~ impliedly confirmed the principle that, constitutionally, they may be withheld from aliens. See *Baldwin* v. *Franks*, 120 U.S. 678, 690-692. Our last proposition, however, is not so obvious. Indeed, it may properly be asked how a *citizenship* privilege which, by definition, is conferred on citizens alone because of the special relationship between them and their government, can be shared with non-citizens. Is not the consequence to "demote" the right in some sense? [23]

[23] It is, of course, established doctrine that Congress may protect privileges of national citizenship, unlike most other

And, if so, would that not violate the settled principle that Congress cannot strip away the protective mantle with which the Constitution itself clothes citizens of the United States? See *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 267; *United States* v. *Wong Kim Ark*, *supra*, 169 U.S. at 703; *Osborn* v. *United States Bank*, 9 Wheat. 738, 827.

The answer, we submit, is this: when Congress shares with aliens a privilege that the Constitution grants to citizens by virtue of their citizenship, the latter continue to enjoy it as a privilege of national citizenship with all the special attributes of that title, while those on whom it is conferred as a matter of legislative discretion hold it precariously with whatever protection Congress has surrounded it, subject to constitutional limitations.[24] In sum, with respect

rights, against wholly private interference. *E.g.*, *Twining* v. *New Jersey*, *supra*, 211 U.S. at 97-98. Moreover, most citizenship rights—unlike those secured by the Due Process or Equal Protection Clauses—are positive, if not absolute, and cannot be abridged by state action, no matter how rational or nondiscriminatory that interference may be.

[24] Constitutional limitations may be of three kinds: (1) those few instances in which the Constitution itself expressly reserves the privilege of citizens (*e.g.*, eligibility for the Presidency); (2) those very rare cases in which conferring the privilege on aliens would invade state prerogatives (*e.g.*, the right to acquire state citizenship by residence, without the state's consent, granted to national citizens by the Citizenship Clause of the Fourteenth Amendment); and (3) perhaps some instances in which the privilege is not related to one of the plenary congressional powers. We may doubt whether any case will fall within our last category, especially considering

to aliens, the privilege is enjoyed only by a defeasible congressional title and may be, even for the time being, less generously protected, whether because Congress cannot, or prefers not to, guard it as firmly as it does in the case of citizens.[25]

The remaining question is whether eligibility for federal employment properly can be deemed one of the privileges of national citizenship. We recognize that the Court has kept the list short, albeit the concern which informed that reluctance—a fear that state power would be too much confined by an expansive definition of citizenship rights (see the opinion of Mr. Justice Stone in *Hague* v. *C.I.O.*, 307 U.S. 496, 520-521, n. 1)—is, of course, irrelevant here. But the test, consistently followed, seems to include our case: whether the right is one of those that "owe their existence to the Federal government, its National character, its Constitution, or its laws."

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the exclusive national authority with respect to aliens under the Naturalization Clause and the foreign relations power.

[25] It will be a rare case when Congress is constitutionally barred from according the same measure of protection to aliens. See p. 35, *supra*, n. 24. But, as a matter of legislative discretion, instances are not lacking. Indeed, at present, the general criminal law that protects citizenship rights against private conspiracies (18 U.S.C. 241) operates only in favor of citizens (see *Baldwin* v. *Franks*, *supra*) and, unless amended, would not prohibit interference with an alien who had been extended such a right. Thus, assuming that eligibility to share in the public domain is a privilege of national citizenship (*United States* v. *Waddell*, 112 U.S. 76), Section 241 does not shield the alien homesteader, presumably even one who has filed his declaration of intent to become a citizen. See 43 U.S.C. 161, 321.

Slaughter-House Cases, *supra*, 16 Wall. at 79. Otherwise stated, the criterion is whether the privilege reasonably can be said to inhere in that special relationship with the national government which is traditionally characteristic of citizenship. See *Hague* v. *C.I.O.*, *supra*, 307 U.S. at 520 (opinion of Stone, J.). See also *Twining* v. *New Jersey*, *supra*, 211 U.S. at 97.[26] So judged, it would be difficult to conclude

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[26] A comprehensive list of privileges and immunities of national citizenship, culled from this Court's opinions, is to be found in *United States* v. *Moore*, 129 Fed. 630, 633 (C.C. N.D. Ala.), cited with approval in *United States* v. *Guest*, 383 U.S. 745, 759. The court there said:

> Among the rights and privileges secured to citizens of the United States, expressly or impliedly, * * * are the right to vote for presidential electors and members of Congress; the right to hold and seek office under the federal government; the right to petition Congress for redress of grievances, and to freely print, speak, or write one's sentiments, being responsible for the abuse thereof, concerning any right or matter committed to the federal government; the right, of his own volition, to become a citizen of any state of the Union by bona fide residence therein, with the same rights as other citizens of that state; the right of every judicial or executive officer or other person engaged in the service, or kept in the custody of the United States, in the course of the administration of justice, to be protected from lawless violence; the right to the privileges of the writ of habeas corpus; the right to go to and return from the seat of government; the right to resort to the courts of the United States; the right to communicate to any executive officer any information which the citizen has of the commission of an offense against the laws; the right to engage in interstate commerce; the right to enter a homestead upon the public domain, and live on it for the purpose of perfecting the entry; the right to claim the protection of the

that eligibility to hold a job with the government of the United States is not properly viewed as a privilege of national citizenship.

It is not irrelevant that other nations, like our own, restrict most government jobs to their own citizens (see *infra*, pp. 54-58). That is, at least in part, a recognition that working for the government is a privilege properly reserved to those who share a common allegiance. But, more fundamentally, in a republic the government is the delegate of the citizenry. The prime right of the citizen is to participate, directly or indirectly, in his own governance. That is why the right to elect federal officers is deemed a privilege of national citizenship. *A fortiori*, one would suppose the more direct participation in government which those who constitute it enjoy ought to be so characterized.

This submission is in no way inconsistent with the Court's previous rulings that the states cannot prohibit aliens from private employment (*Truax* v. *Raich*, *supra*) or exclude them, as such, from state jobs (*Sugarman* v. *Dougall*, *supra*). Those relationships obviously have nothing to do with the existence

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government when on the high seas or in foreign lands, or in any place committed exclusively to federal jurisdiction; the right to be exempt from discrimination on account of race, as to equality before the law, suffrage, or service on juries; the right to pass from one state to any other for any lawful purpose; the right to be free from taxes and excises not imposed by the state on its own citizens; and the right to be free from slavery or involuntary servitude, except as a punishment for crime.

of the federal government or its national character, and the rights involved are not meaningfully associated with citizenship of the United States. But *federal* employment is. This is the same distinction as that which the Court has drawn between state and federal elections. See *Ex parte Yarbrough*, *supra*; *Oregon* v. *Mitchell*, *supra*.

Nor does our argument, under this heading, depend on any suggestion that Congress or the President has power to create new privileges of national citizenship. We adhere to the settled doctrine that no branch of government can expand or contract the substantive content of the Privileges and Immunities Clause. See *United States* v. *Cruikshank*, *supra*, 92 U.S. at 550. Certainly, we do not suggest that the protection that aliens enjoy by virtue of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Due Process Clause of the Fifth can be abrogated by legislative expansion of the Privilege and Immunities Clause. On the other hand, we submit that a congressional judgment on a constitutional issue is entitled to respect as an authoritative brief laid before this Court and, further, that when that judgment is both ancient and continuing it is evidence of the understanding and probable meaning of the constitutional text in question. Accordingly, we deem it relevant that Congress has so long treated eligibility for the competitive federal civil service as a privilege of national citizenship.

That has been the Court's consistent approach. While a congressional decision to confine a privilege to citizenship has never been deemed dispositive,[27] the Court has always noticed a legislative determination as persuasive evidence. Indeed, in almost every case in which the Court has recognized a right as uniquely appertaining to national citizenship, legislation has been invoked to reach that result.[28] Thus, in *Ex parte Yarbrough*, *supra*, 110 U.S. at 655, a specific criminal statute condemned a conspiracy to prevent "any citizen" otherwise qualified from participating in congressional elections. In *United States* v. *Waddell*, 112 U.S. 76, 79, vindicating the right to

[27] Thus, the Privileges and Immunities Clause alone presumably would not justify any generalized attempt, by federal law, to confine state jobs to national citizens. The reason would be (objections under the Tenth Amendment aside) that there is no sufficient legitimate federal interest in the matter to view eligibility for state employment as a privilege of national citizenship.

[28] In none of the cases cited in the remainder of this paragraph was the Privileges and Immunities Clause of the Fourteenth Amendment directly invoked because only wholly unofficial conduct, not reached by the Clause *ex proprio vigore*, was involved. Rather, the issue was whether the right asserted was protected by the criminal provision that is now 18 U.S.C. 241, which vindicates only "any right or privilege secured * * * by the Constitution or laws of the United States" to "any citizen." At the time of the decisions invoked here, and until *United States* v. *Price*, *supra*, those rights were thought to be the same as the "privileges or immunities of citizens of the United States" secured against state interference by the Privileges and Immunities Clause of the Fourteenth Amendment. See, *e.g.*, *Twining* v. *New Jersey*, *supra*, 211 U.S. at 97.

undisturbed enjoyment of a homestead entry, the Court expressly noted that the right was "wholly dependent upon * * * [an] act of Congress" that restricted the privilege to citizens. Again, in *Logan* v. *United States*, 144 U.S. 263, 284, federal statutes were invoked to justify the conclusion that a citizen was protected against violence while in federal custody. Even *In re Quarles*, 158 U.S. 532, 537, involving the right of a citizen to inform concerning violations of the internal revenue laws without interference, turned in part on statutes defining the duties of deputy marshals. And, conversely, when the Court declined to treat an asserted right as protected by the Privileges and Immunities Clause, it pointed to laws that had permitted aliens to share it. *E.g.*, *Bradwell* v. *The State*, *supra*, 16 Wall. at 139, quoted in *In re Griffiths*, *supra*, 413 U.S. at 719 (practice of law); *Minor* v. *Happersett*, 21 Wall. 162, 177 (right to vote).

In sum, the Fourteenth Amendment teaches that equal protection analysis has no place when we are dealing with rights that can properly be characterized as privileges of national citizenship and that congressional action is relevant to that characterization. The result can be no different because here the equal protection claim is advanced under the Fifth, rather than the Fourteenth Amendment. After all, it was only under compulsion of Fourteenth Amendment decisions that the Court imported the equal protection principle into the Fifth. See *Bolling* v. *Sharpe*, 347 U.S. 497; *Currin* v. *Wallace*, 306 U.S. 1, 14. The

critical test in both cases must be, not whether there are compelling reasons for excluding aliens, but, rather, whether the privilege is one that reasonably can be said to appertain to that special relationship which exists between citizens and their national government. We submit that eligibility for federal employment is such a privilege which Congress is free to reserve for citizens of the United States.

3. *Congress Has Broad Constitutional Power "To Fix The Conditions Under Which Aliens Are To Be Permitted To Enter And Remain In This Country."*

This Court has frequently recognized that Congress has broad power to deal with the special problems of aliens, as a part of its plenary power over immigration and naturalization. Article I, Sec. 8, cl. 4, of the Constitution explicitly vests in Congress the power to establish uniform rules of naturalization. Moreover, this Court has long held that the power of the federal government to admit and exclude aliens is also an inherent, essential incident of the national sovereignty established by the Constitution. See, *e.g.*, *Chinese Exclusion Case*, 130 U.S. 581, 603-604; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705, 713; *Galvan* v. *Press*, 347 U.S. 522, 530-532; *Kleindienst* v. *Mandel*, 408 U.S. 753, 766. Protraction of an alien's "ambiguous status within the country is not his right but is a matter of permission and tolerance," subject to "[t]he Government's power to ter-

minate its hospitality * * *." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 586-587.

The benefits and burdens attaching to the status of aliens affect whether immigration to this country will be more or less attractive to citizens of other countries (cf. 2 Farrand, *The Records of the Federal Convention of 1787*, at 235 (1966 rev. ed.)), and the determination whether and to what extent immigration of aliens is to be encouraged or discouraged is a matter "belonging to the political branch of the Government * * *." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 596 (Frankfurter, J., concurring). Accordingly, encompassed within the "plenary power to make rules for the admission of aliens" (*Boutilier* v. *Immigration Service*, 387 U.S. 118, 123) is comparably broad power "to fix the conditions under which aliens are to be permitted to enter and remain in this country." *Flemming* v. *Nestor*, 363 U.S. 603, 616; accord, *Takahashi* v. *Fish Comm'n*, *supra*, 334 U.S. at 419.

By vesting the Congress with the power to establish rules of naturalization, the Framers of the Constitution authorized Congress, in Madison's words, to fix different conditions for "enjoying different privileges of citizenship * * *." 2 Farrand, *supra*, at 235. See also *id.* at 268 (remarks of Hamilton). In consequence, the alien in the United States "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Johnson* v. *Eisentrager*, 339 U.S. 763, 770.

Thus, while Congress has frequently extended

rights or imposed burdens on "persons" or "individuals" without distinction between citizen and alien,[29] the United States Code contains literally hundreds of provisions reflecting precisely drawn distinctions between citizens and some or all aliens in the provision of both benefits and burdens. See Appendix, *infra*. As a result, while it may be true in a general sense that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society" (*In re Griffiths*, *supra*, 413 U.S. at 722), even in those activities aliens have in some circumstances[30] been exempted by Congress from such obligations of citizenship.[31]

Similarly, in determining which of the "different privilges of Citizenship * * *" (2 Farrand, *supra*, at 235) aliens should have, Congress has drawn lines throughout our history, but not always the same lines. Congress has for some purposes extended privileges

[29] *E.g.*, 42 U.S.C. 402(a) (retirement benefits); 42 U.S.C. 1983 (protection of civil rights).

[30] *E.g.*, 50 U.S.C. App. 454(a) (liability for military training and service limited to citizens and to aliens admitted for permanent residence); 16 U.S.C. 781 (prohibition against certain fishing beyond state territorial limits applies only to citizens and persons owing duty of obedience to laws of the United States); cf. 19 U.S.C. 1586(e) (prohibition against unloading vessels within specified off-shore waters applicable only to citizens).

[31] "The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation." *Trop* v. *Dulles*, 356 U.S. 86, 92.

only to citizens of the United States,[32] while for other purposes it has also extended privileges to aliens who have been "lawfully admitted for permanent residence" [33] or who have declared their intention to become citizens.[34]

At times, Congress has made explicit the foreign relations dimensions of legislation concerning aliens, as where it has conditioned the right of an alien to exercise certain privileges of a citizen upon reciprocal treatment of United States citizens in the alien's own country,[35] or where it specifically makes refugees from a particular country eligible for benefits to which they would not otherwise be entitled.[36]

Although the details vary, the dominant theme of the conditions imposed by Congress on aliens' eligibility for benefits or privileges available to citizens is that they demonstrate some substantial and en-

[32] *E.g.*, 7 U.S.C. 1941(1), 1961(b)(1) (Section 1961(b)(1) held unconstitutional in *Gomez* v. *Butz*, No. 326-73 (D.P.R.), decided May 29, 1974, *sub nom. Ramos* v. *United States Civil Service Commission*, appeal docketed, No. 74-216); 7 U.S.C. 1158(c); 10 U.S.C. 8285(a)(1); 12 U.S.C. 1427(a); 25 U.S.C. 399; 28 U.S.C. 1861, 1865(b)(1) (held constitutional in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md.), appeal docketed, No. 73-1915); 28 U.S.C. 1872; 42 U.S.C. 1971(a), 1973, 1982; 43 U.S.C. 145; 47 U.S.C. 303(1), 310(a)(1); cf. 69 Stat. 699, as amended, 1 D.C. Code 1102(2).

[33] *E.g.*, 10 U.S.C. 8253; 42 U.S.C. 428(a); 47 U.S.C. (Supp. II) 310(a).

[34] *E.g.*, 10 U.S.C. 311(a); 30 U.S.C. 22; 43 U.S.C. 161; 47 U.S.C. (Supp. II) 310(a); 48 U.S.C. 1501, *et seq.*

[35] *E.g.*, 10 U.S.C. 7435(a); 15 U.S.C. 1126(b); 26 U.S.C. 901(c); 28 U.S.C. 2502; 42 U.S.C. 402(t)(2); 46 U.S.C. 785.

[36] *E.g.*, 42 U.S.C. 2713, 2742, 2949(3).

during connection with the United States. Aliens who satisfy that requirement have in the main been generously provided for and treated by Congress as if they had already achieved citizenship. Indeed, the solicitude with which Congress has generally treated aliens demonstrates that, despite their temporary inability to vote in most jurisdictions,[37] it would be inaccurate to characterize them as being in a position of "political powerlessness." *Johnson* v. *Robison*, *supra*, 415 U.S. at 375, n. 14.

4. *As Chief Executive And Commander-In-Chief, The President Has Broad Inherent Powers Pertaining To Matters Affecting Foreign Relations And The Unique Responsibilities Of The Executive Branch.*

The executive order authorizing the Civil Service Commission to use "citizenship" as a qualification for employment in the federal competitive civil service was promulgated by the President, not only pursuant to authority vested in him by Congress under the civil service laws, but also "[b]y virtue of the authority vested in me by the Constitution * * * and as President of the United States * * *." Executive Order No. 10577, *supra*, p. 3.

[37] In fiscal year 1972, more than 100,000 aliens became naturalized citizens. Annual Report of the Attorney General 196 (1972). Many resident aliens at any given time are potential citizens and are frequently close relatives of voters, so that their interests cannot lightly be disregarded by members of Congress. The large volume of private bills benefitting aliens enacted each year (*e.g.*, 86 Stat. 1527-1568, *passim*) demonstrates that they are not lacking in meaningful political power.

Pursuant to both the explicit provisions of the Constitution and the inherent incidents of national sovereignty, the federal government, unlike a state, has important powers and responsibilities concerning foreign relations and national defense. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-318. The exercise of these powers of the federal government is peculiarly the inherent responsibility of the President, not necessarily requiring as its basis an act of Congress. *Id.* at 319-320; cf. *The Flying Fish* (*Little* v. *Barreme*), 2 Cranch 170, 177. See also *In re Debs*, 158 U.S. 564, 582, 599; *New York Times Co.* v. *United States*, 403 U.S. 713, 727-730 (Stewart, J., concurring); *id.* at 741-742 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting). In the exercise of these powers, the President may take action concerning aliens through treaties (*e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429) or by other means. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (power to exclude aliens is "inherent in the executive"). See generally Henkin, *Foreign Affairs and the Constitution* 45-56 (1972).

In addition, in carrying out his inherent responsibilities as Chief Executive, as well as his explicit constitutional duty to "take Care that the Laws be faithfully executed * * *" (Article II, Sec. 3), the President has some latitude, even without authorization from Congress, not only to take action concerning aliens to satisfy the obligations of the United States

under international law,[38] but also to establish qualifications, such as allegiance to the nation, for those who would assist in the implementation of the functions of the Executive Branch.

5. *The Judicial Role In Determining The Constitutionality Of The Decision Of The Federal Government to Limit the Employment Of Aliens In The Competitive Civil Service Is Exceptionally Constricted And The Limitation Is Valid Without Regard To Its Rationality Or The Substantiality Of The Underlying Reasons.*

As this Court has repeatedly observed, federal "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. Such policies are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588-589. "[T]hat the formulation of these policies [toward aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. See *Lees* v. *United States*, 150 U.S. 476, 480. Indeed, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 589. The Court's reaffirmations of these general principles "have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766.

[38] International law is "part of our law." *The Paquete Habana*, 175 U.S. 677, 700; see Henkin, *supra*, at 55-56.

We do not contend that the powers of Congress and the Executive Branch concerning aliens are without limit. However, where a restriction imposed by the federal government upon aliens neither contravenes any explicit prohibition of the Constitution nor otherwise "clashes with those individual liberties protected by the Bill of Rights * * *" (*United States* v. *Robel*, 389 U.S. 258, 264), the courts have no warrant to inquire into its possible justifications or its consequences.[39]

In such a case, the restriction need not be shown to be necessary to promote a compelling governmental interest nor to have a rational basis—not because arbitrariness or irrationality is to be encouraged, but because the question is essentially "political" in nature. Cf. *C. & S. Air Lines, Inc.* v. *Waterman Corp.*, 333 U.S. 103, 111.[40]

[39] We need not address here the hypothetical possibility of a provision concerning aliens which, while not implicating either the liberties protected by the Bill of Rights or other explicit Constitutional prohibitions, could be regarded as offensive to the "conscience" of the nation. As we show below, the limitation challenged here has deep historical roots in this country and is consistent with the practices of all Western nations, if not all nations (see pp. 54-58, *infra*).

[40] Even where "First Amendment rights are implicated * * *" (*Kleindienst* v. *Mandel*, *supra*, 408 U.S. at 765), federal action concerning aliens is not subject to as great an extent of judicial scrutiny as would be appropriate in almost any other context. *Id.* at 770.

The regulation before the Court has not been—and could not be—challenged as contravening any explicit Constitutional prohibition, nor as impinging upon the exercise of liberties protected by the Bill of Rights.[41] Because limitation of the employment of aliens in the federal competitive civil service thus does not clash with any pertinent substantive limitation on the power of the federal government, the constitutionality of the regulation must be sustained without consideration of the rationality or the substantiality of the reasons that might underly it.

B. The Regulation In Suit Is Valid Even If Equal Protection Principles Do Apply.

We have argued that equal protection principles are inappropriately invoked here. Alternatively, we submit that the regulation limiting employment of aliens in the federal competitive civil service is justified, even if subjected to equal protection analysis.

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[41] This Court has never held that the right to be hired by the federal government (as opposed to retention of such a job) constitutes "liberty" or "property" within the meaning of the Due Process clause of the Fifth Amendment. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894-898. The well-settled rule is that, "[i]n the area of federal regulation of government employees, * * * in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring * * *" (*Arnett* v. *Kennedy*, No. 72-1118, decided April 16, 1974, slip op. p. 17), at least when the ground for decision is not "patently arbitrary" (*Cafeteria Workers* v. *McElroy*, *supra*, 367 U.S. at 898) or does not infringe upon the employee's "constitutionally protected interests—especially his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597. See also *Sampson* v. *Murray*, 415 U.S. 61, 70, n. 17, 83.

At the outset, we must recognize that the Court has developed two distinct equal protection standards, one for the usual case, another for those instances where a "suspect classification" or "fundamental constitutional right" is involved. Under the "traditional" analysis, a federal statute "must be sustained if the classification itself is rationally related to a legitimate governmental interest." *United States Department of Agriculture* v. *Moreno*, *supra*, 413 U.S. at 533 (citing cases). See also *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101. In considering a proferred "rational basis" for a legislative classification, moreover, "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." *Flemming* v. *Nestor*, *supra*, 363 U.S. at 612; see *McGowan* v. *Maryland*, 366 U.S. 420, 426. The law or regulation may withstand constitutional challenge although it is underinclusive (*Geduldig* v. *Aiello*, No. 73-640, decided June 17, 1974, slip op. pp. 9-10), or overbroad (*Dandridge* v. *Williams*, 397 U.S. 471, 484-485). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 50-55.

On the other hand, the Court, in special cases involving "inherently suspect" classifications or "fundamental rights," has imposed a more stringent standard. In those instances, it is said that the measure must withstand "strict scrutiny" and be shown to be justified by a "compelling governmental interest."

This test was applied in *Sugarman* to state rules barring aliens from state jobs and was invoked by respondents and the court of appeals in this case.

Accordingly, it would seem appropriate to determine first which test governs our case (assuming equal protection principles apply at all, as we do for the purpose of the ensuing discussion). If we do not strictly follow that course here, it is only because, in our view, much the same considerations determine both the proper standard and the sufficiency of the justification behind the regulation. Whatever the correct analysis in a different context, here we believe the two issues are so intermingled that it is impractical to separate them without indulging in undue repetition. What follows, therefore, should be understood to suggest (1) that the "rational basis" test is applicable and satisfied, and (2) that, if the "compelling interest" test governs, it, too, has been met.

1. *The Reasonableness Of A General Requirement Of Citizenship For Employment In The Federal Competitive Civil Service Is Supported By The Fact That It Has Been Imposed By Congress And The Executive For More Than 100 Years.*

As we show in detail below (see pp. 72-85, *infra*), for more than 100 years it has been the policy and practice of the federal government generally to limit or ban the employment of aliens in the federal competitive civil service. While not always compelled by explicit statutory command, that policy has been implemented with the knowledge and clear approval of Congress and the Executive throughout that

period, has repeatedly been reinforced by specific legislation containing comparable requirements, and has been embodied in the formal Rules of the Civil Service Commission since they were initially promulgated by President Arthur in 1883.[42]

We do not argue, of course, that the mere antiquity and persistence of the citizenship limitation disposes of any challenge to its constitutionality. That history does suggest, however, that a citizenship requirement has, upon due consideration by various Congresses, Presidents and Civil Service Commissioners, been deemed a reasonable requirement that serves legitimate governmental interests. Such collective historical judgments are not lightly to be dismissed. As this Court observed in sustaining the constitutionality of property tax exemptions for religious organizations, although "no one acquires a vested or protected right in violation of the Constitution by long use, • • • [y]et an unbroken practice • • • openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678; see *McGautha* v. *California*, 402 U.S. 183, 203; *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31, cf. *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, 411 U.S. at 55.

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[42] The present regulations are actually less restrictive than those initially adopted, in that limited exceptions to the citizenship requirement have since been adopted (see pp. 80-82, *infra*).

2. *Exclusion Of Aliens From The Civil Service Is A Long-Standing And Widely-Followed Policy Of Other Nations And Is Consistent With International Law.*

In England, it was recognized early that an alien did not have the legal capacity to hold official positions under the Crown. See 9 Holdsworth, *History of English Law* 91-92 (1926). Section 3 of the Act of Settlement of 1700 (12 & 13 Will. 3, c. 2), provided that

> no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (* * * except such as are born of English parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the crown, to himself or to any other or others in trust for him.

The disability extended to the least significant offices (see, *e.g.*, *R.* v. *Ferdinand de Mierre*, 5 Burr. 2787 (1771) (constable); *Anthony* v. *Seger*, 1 Hagg. Con. 9 (1789) (church warden)), as well as to the highest positions in the realm (*Newburgh Peerage Case*, 90 H. L. Journal 491 (1858) (peer)).[43] Simi-

[43] At present, aliens are excluded from the civil service by the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. 5, c. 92), Sec. 6, which provides: "After the passing of this Act no alien shall be appointed to any office or place in the Civil Service of the State." That Act was amended by the Aliens' Employment Act, 1955 (4 Eliz. 2, c. 18), which permits the employment of an alien in a civil capacity under the

larly, employment in the public service is uniformly limited to citizens in civil law countries, most of whose civil service laws antedated the formal establishment of the federal civil service in this country."

Crown (a) where he is appointed and employed abroad in appropriate service, or (b) where his employment is warranted by a certificate issued by the responsible minister with the consent of the Treasury.

" See, *e.g.*, *France*: Ordonance No. 59-244, of Feb. 4, 1959, Art. 16:

"Nul ne doit être nommé a un emploi public s'il ne possède la nationalité française sous reserve des incapacités prévues par le Code de la Nationalité Française."

[No person may be appointed to public office unless he possesses French nationality, subject to the provisions of the Code on French Nationality.]

Germany: Bundesbeamtengesetz (Law on Federal Civil Service) of Jul. 14, 1953, § 7(1):

"In das Beamtenverhältnis darf nur berufen werden, wer

1. Deutcher im Sinne des Artikels 116 des Grundgesetzes ist * * *."

[Only those who are Germans within the meaning of Art. 116 of the Basic Law, may be admitted into the civil service.]

Italy: Statuto degli Impiegati Civili dello Stato (Statute on Civil Employment by the State), Art. 2:

Possono accedere agli impieghi civili dello Stato coloro che posseggono i sequenti requisiti generali:

1) cittadinanza italiana * * *."

[Those may be employed by the state as civil servants who meet the following general requisites: (1) Italian citizenship.]

Finally, further evidence of the reasonableness of the exclusion of aliens from public employment is found in public international law, which this Court has traditionally referred to in applying domestic law touching upon subjects which, in inter-governmental relations, are governed by principles of that law. See, *e.g.*, *Galvan* v. *Press*, *supra*, 347 U.S. at 531-532;

Netherlands: Grondwet voor het Koninkrijk der Nederlanden (Constitution of the Kingdom of The Netherlands), Art. 5:

"1. Iedere Nederlander is tot elke landsbediening benoembaar.

2. Geen vreemdeling is hiertoe benoembaar dan volgens de bepalingen der wet."

[1. Every Netherlands subject shall be eligible for appointment to any office in the service of the state.

2. No alien shall be eligible for such appointment save in accordance with the provisions of special law.]

Switzerland: Bundesgesetz über das Dienstverhältnis der Bundesbeamten (Federal Law Governing the Relationship of Federal Civil Servants) of Jun. 30, 1927, Art. 2:

"Wählbar als Beamter ist jeder Schweizerbürger männlichen oder weiblichen Geschlechts, der einen unbescholtenen Leumund geniesst * * *."

[Every Swiss citizen, of male or female sex, may be appointed as civil servant if he enjoys a good reputation.]

For a general survey of the domestic laws of other countries, see United Nations, Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* (1966). At the time of that survey, only Ethiopia did not restrict public service posts to nationals. *Id.* at 329.

Harisiades v. *Shaughnessy*, *supra*, 342 U.S. at 585-586; *Lau Ow Bew* v. *United States*, 144 U.S. 47, 61-62, cf. *United States* v. *California*, 381 U.S. 139, 165. Writers and publicists on international law are unanimous that international law does not require that aliens be treated as nationals as long as there is a reasonable basis for different treatment. All positions impressed with a public interest, and the performance of functions in a public capacity, may be reserved exclusively to nationals of a country. As stated in Roth, *The Minimum Standard of International Law Applied to Aliens* 151-152 (1949):

> Under political rights we understand rights which enable the individual to take part in the exercise of the State power, and to participate in any manner in the formulation of the will of the State. It is unanimously agreed that according to common international law the alien may be excluded from the possession of the rights which normally belong solely to the nationals of the State.
>
> * * * * *
>
> In accordance with this general rule, it is furthermore universally recognized that the State of residence may exclude aliens from all public employment, civil or military and from all functions which include a delegation of a part of public power.

See also 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 650 (1945); Freeman, *Denial of Justice* 510 (1938); Borchard, *Diplomatic Protection of Citizens Abroad*

62 (1915); Cutler, *The Treatment of Foreigners*, 27 Am. J. Int'l L. 225, 228 (1933).

3. *The Plenary Federal Power To Regulate With Respect To Aliens Justifies A Federal Regulation That Would Be Impermissible If Promulgated By A State.*

In *Sugarman* v. *Dougall*, *supra*, this Court recognized that a state had an interest "in limiting participation in * * * [its] government to those who are within 'the basic conception of a political community'" (413 U.S. at 642), that "alienage itself is a factor that reasonably could be employed in defining 'political community'" (*id.* at 649), that a state has "historical power to exclude aliens from participation in its democratic political institutions" (*id.* at 648), and that, at a minimum, a state could constitutionally prescribe citizenship as a qualification "for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government." *Id.* at 647. These considerations apply no less to the federal government than to a state government.

In *Sugarman*, however, the Court struck down a state statute requiring that all persons in the competitive civil service of the state be citizens of the United States, because, in view of the "narrow limits" of state power to legislate with respect to aliens and the strict scrutiny to which state classifications based on alienage are subject (*id.* at 642), the ban on employment of persons who were not citizens of the United States was broader than required by legitimate

state interests. The Court added that it would not be so demanding in scrutinizing provisions concerning alienage that rest upon "constitutional prerogatives" not involved in *Sugarman* (*id.* at 648), and specifically noted that its decision did not necessarily apply to citizenship requirements for federal employment. *Id.* at 646, n. 12. The court below, we submit, erred by ignoring the caveats. Our case is not controlled by *Sugarman*.

We have already argued that plenary federal power with respect to aliens removes this case from equal protection analysis. But, at the least, the existence of such a power in the federal government, and the absence of comparable state power, distinguishes our case. Here, an explicit "constitutional prerogative" justifies the regulation. When a state imposes a like restriction, not only can it invoke no comparable prerogative, it must also overcome a potential conflict with the exercise of federal power.

Because the Constitution vests exclusively in Congress the plenary power to legislate with respect to immigration and naturalization, the power of the states to regulate the rights, conduct, and affairs of aliens is very limited. *Hines* v. *Davidowitz*, 312 U.S. 52, 66-68; *Graham* v. *Richardson*, *supra*, 403 U.S. at 374-378; *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 646-649. An important benefit to aliens flowing from the existence of comprehensive federal power to regulate with respect to aliens is that it precludes state regulation that is more severe and burdensome. For example, in *Truax* v. *Raich*, 239 U.S. 33, the

Court struck down a state law that limited the ability of all private employers to hire aliens. The Court held that a lawfully admitted alien had a federal privilege to enter and abide in any state of the Union, and that this privilege carried with it the right to work there "in the common occupations of the community." *Id.* at 41. In *Hines* v. *Davidowitz*, *supra*, the Court invalidated, because it conflicted with federal law, a state law requiring the annual registration and fingerprinting of aliens. And in *Graham* v. *Richardson*, *supra*, the Court voided state laws limiting eligibility of aliens to welfare assistance, because Congress, in providing that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry, had in effect declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property. 403 U.S. at 376-380.[45]

As the Court noted in *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 646, state-imposed restrictions on employ-

[45] In *Zschernig* v. *Miller*, 389 U.S. 429, the Court invalidated a state law limiting inheritance of personal property by aliens from certain countries because it impermissibly intruded into an area of federal authority, even though it did not conflict with any existing treaty or act of Congress.

ment of aliens may also be regarded as conflicting with the comprehensive authority of the federal government concerning aliens. Obstacles to assertions of federal authority concerning the rights of aliens imposed by state laws create potential problems in the exercise of federal responsibilities for foreign relations and treaty-making. The United States has entered into numerous reciprocal treaties touching upon the employment rights of aliens in this country and of United States citizens in other countries. See, *e.g.*, *Asakura* v. *Seattle*, 265 U.S. 332, 341-342. See generally 8 Whiteman, *Digest of International Law* 429, *et seq.* (1967); Wilson, *Postwar Commercial Treaties of the United States*, 43 Am. J. Int'l L. 262 (1949); Comment, *International Law—Reservations to Commercial Treaties Dealing with Aliens' Rights to Engage in the Professions*, 52 Mich. L. Rev. 1184 (1954). While those treaties typically do not expressly cover employment in the civil service of the respective contracting parties, that would be an appropriate subject for such a treaty provision, particularly in view of the nearly universal practice among nations of restricting the employment of aliens in the civil service (see pp. 54-58, *supra*). If, however, the United States were held to be obliged severely to limit or to eliminate the exclusion of aliens from civil service employment, it would be deprived of the basis for negotiating the reciprocal termination of comparable discrimination against the employment of American citizens in the civil services of other countries.

Moreover, state laws limiting the employment rights of aliens—whether in public or private employment—"may well adversely affect the power of the central government to deal with those problems" (*Zschernig* v. *Miller*, *supra*, 389 U.S. at 441), whether by negotiation or by enactment of reciprocal provisions (cf. 28 U.S.C. 2502; 46 U.S.C. 785), while comparable federal restrictions would not have the same adverse effects.

In light of the *prima facie* absence of state power, this Court has indicated that classifications in state law "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, *supra*, 403 U.S. at 372 (alternative holding); *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 642; *In re Griffiths*, *supra*, 413 U.S. at 721. But, because federal power to regulate with respect to aliens is expressly conferred, and is plenary (see pp. 42-50, *supra*), the proposition that alienage is a "suspect" category subject to "strict scrutiny" is not applicable here. We submit that the same standard cannot be applied and that a federal law or regulation concerning aliens may well be constitutional even though an identical state statute would be invalid. Cf. *Head Money Cases*, 112 U.S. 580, 591-594; *Oyama* v. *California*, 332 U.S. 633, 646; *Richardson* v. *Ramirez*, No. 72-1589, decided June 24, 1974, slip op. pp. 28-29. See also *Roth* v. *United States*, 354 U.S. 476, 503-505 (Harlan, J., concurring in part).

4. *Federal Civil Service Employment Involves Unique Responsibilities And Relationships To Which A Citizenship Requirement Bears A Substantial Relationship Not Existing With Respect To State Civil Service.*

Federal government employment differs from state employment in certain pertinent respects that were, of course, not dealt with in *Sugarman*. The United States, unlike a state, is a nation in an international political community. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-318. As such, it may lay claims on the loyalty and allegiance of its native population in a manner not open to a state. Cf. *Minor* v. *Happersett*, *supra*, 21 Wall. at 165-166.[46]

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[46] As stated in a comprehensive study by the American Assembly of Columbia University (*The Federal Government Service* 165 (2d ed., 1965):

> The [national] state, whether viewed as sovereign itself or as the expression of the will of a sovereign people, yields to no other power and demands the final allegiance of its members (citizens). Employees of the state stand in a special relation to it; they are presumed to be servants of a sovereign authority.
>
> We need not here indulge in argument about the theoretic validity of sovereignty in a democratic state. The idea behind it, however valid, has shaped, in a number of ways, the nature of public employment. • • • [I]t is presumed to demand, on the part of public employees as individuals, a special kind of loyalty—a loyalty running beyond the immediate job and organization and to the government as a whole. This loyalty brooks no rival if another allegiance undertakes or threatens to compete with it. The problems involved in the enforcement of such a single-minded loyalty have long been a source of difficulties in our national government. • • •

As a sovereign nation, moreover, the United States has uniquely national responsibilities for such matters as war, international relations, and foreign commerce (cf. pp. 46-48, *supra*), concerning which the undivided allegiance of its employees to the nation may reasonably be thought indispensable. Lack of citizenship or permanent allegiance to the United States may therefore more readily present problems in federal employment—at any level—than in state employment. Indeed, the alien does not merely lack allegiance to the United States, under international law, but in most cases still owes an affirmative duty of allegiance to a foreign nation, thereby leaving "outstanding a foreign call on his loyalties * * *." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 585-586.

The unique status of civil service, moreover, pervades all ranks and is not limited to policy-making positions. Indeed, as Mr. Justice Douglas stated in *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 121:

> [T]op policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service.

The citizenship requirement in issue here is better calculated than that involved in *Sugarman* to serve legitimate governmental interests concerning participation in the affairs of the "political community." For example, a government might reasonably conclude that its employees should have a knowledge and understanding of the history, and of the principles and form of its government. A requirement that civil service employees be citizens of the United States would serve that purpose less readily for a state than it would for the federal government. Even native-born citizens, given mobility of population, would not all be likely to have such knowledge and understanding concerning the state where they reside or for which they seek to work than they would have with respect to the government of the United States. Similarly, naturalized citizens are required to have such knowledge and understanding with respect to the government of the United States, as a condition of citizenship (8 U.S.C. 1423(2)) but need not have such knowledge or understanding as to any state government. Accordingly, a requirement of United States citizenship is more reasonably and substantially related to legitimate interests concerning federal civil service employment than state employment. Cf. *Balzac* v. *Porto Rico*, 258 U.S. 298, 310.

5. *The Challenged Regulation Is Not Impermissibly Broad In Scope.*

In the exercise of undeniable governmental authority to prescribe qualifications for federal employment and to extend the privileges of citizenship to aliens, numerous choices had to be made and various lines drawn in balancing the interests of the federal government, as a sovereign nation and as an employer, in promoting the efficiency of the public service it performs, and the interests of those who would become its employees. With respect to citizenship *vel non*, eligibility for federal civil service employment might have been limited entirely to citizens, as has eligibility for other governmental privileges, programs and benefits,[47] or might also have included, for example, others who owe permanent allegiance to the United States,[48] aliens lawfuly admitted for permanent residence,[49] aliens who have declared their intention to become citizens of the United States,[50] aliens permanently residing within the United States

[47] See generally the statutes cited in the Appendix to this brief.

[48] See, *e.g.*, 5 C.F.R. 338.101(a), (b).

[49] *E.g.*, 10 U.S.C. 8253; 42 U.S.C. 428(a); 47 U.S.C. (Supp. II) 310(a).

[50] *E.g.*, 10 U.S.C. 311(a); 30 U.S.C. 22; 43 U.S.C. 161; 47 U.S.C. (Supp. II) 310(a); 48 US.C. 1501, *et seq.*; 83 Stat. 337; 87 Stat. 525.

under color of law,[51] aliens from particular countries,[52] or aliens whose own native countries permit United States citizens to work in their civil service.[53]

Similarly, different lines concerning citizenship might have been drawn for different departments or agencies, or for different positions within a department or agency,[54] or for different grade levels; alternatively, such determinations might have been left to an administrator to make on an *ad hoc* basis with reference to particular positions.[55]

That the Commission's regulation applies instead, as regards persons other than citizens or those owing permanent allegiance to the United States, to all positions within the competitive civil service, at all levels, and in all departments, does not render it impermissibly "overbroad."

There can be no doubt that the formation and execution of policy within the Executive Branch may properly be confined to citizens. *Sugarman* v. *Dougall*,

[51] *E.g.*, 42 U.S.C. (Supp. II) 1382c(a)(1)(B)(ii); cf., *e.g.*, 42 U.S.C. 2713, 2742, 2949(3).

[52] *E.g.*, 42 U.S.C. 2713, 2742, 2949(3); 83 Stat. 337; 87 Stat. 525-526.

[53] Cf., *e.g.*, 10 U.S.C. 7435(a); 15 U.S.C. 1126(b); 26 U.S.C. 901(c); 28 U.S.C. 2502; 42 U.S.C. 402(t)(2); 46 U.S.C. 785. Congress has provided that if a United States citizen undertakes such employment under certain circumstances he loses his American citizenship. 8 U.S.C. 1481(a)(4). But cf. *Afroyim* v. *Rusk*, *supra*.

[54] In certain instances this has been done. See p. 84, *infra*, n. 72.

[55] Cf. *e.g.*, 22 U.S.C. 1044, 1471.

supra, 413 U.S. at 647-649. Nor can there be doubt that there are many types of facilities and installations where even menial jobs may properly be restricted to those who owe the nation allegiance. This being true, the Civil Service Commission, having been delegated the broad constitutional powers of the Congress and the President with respect to government employment and the status of aliens, properly may conclude that the needs of government are best served by a general rule requiring citizenship for employment in the federal competitive civil service. Any other rule would require the classification of all the enormous variety of federal jobs, and their constant reclassification as jobs are created, modified, shifted, and redefined. Moreover, all aliens permitted to work at menial tasks would have to be monitored to make sure that they were not transferred to facilities or installations from which they could unquestionably be properly excluded.

While this enormous administrative burden would fall initially upon the Executive Branch, the exercise of the Executive's discretion would no doubt be regularly challenged in the courts, and the judiciary would be drawn into the continuing process of classifying and reclassifying jobs. This very case suggests the beginning of the problem, for while one respondent wants to be a federal janitor, another wants employment with the Department of Health, Education, and Welfare as an evaluator of educational programs, surely a task with policy implications. The latter respondent has lived in this country for 28 years without becoming a citizen, which suggests a voluntary choice to commit her allegiance to some other country rather than to this country.

The problem of differentiating among jobs, among facilities, and, indeed, among different categories of aliens, is so large and intricate, and risks of an unduly narrow application of a citizenship requirement so potentially serious, that the courts ought not to thrust that task upon the Executive, or, ultimately, upon themselves, unless the Constitution clearly requires it. To the contrary, the government's constitutional powers over the status of aliens, as well as the problems of administrative convenience, support the general rule established by the regulations.

Indeed, the Commission's regulation is no broader than the prohibitions of the Hatch Act concerning partisan political activity by federal employees, the constitutionality of which was recently reaffirmed in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548; see *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 101-103. A ban covering all employees was sustained there, even though it might reasonably be contended that the principal evil at which the restriction was directed—that federal employees "should administer the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party" (413 U.S. at 564-565)—was not presented by partisan political activity by many categories of employees covered by the general ban.[26]

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[26] As Justice Brennan observed in *United States* v. *Robel*, 389 U.S. 258, 270-271, "Congress often regulates indiscrimi-

The gist of respondents' complaint is that the lines drawn with respect to eligibility of aliens for the governmental positions they seek should have been different, and that Congress and the Executive Branch should have opened such jobs to all aliens residing in the United States. (Indeed, their complaint does not even limit their claim to aliens who have lawfully entered or remained in this country.) However, as this Court noted in *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 102:

> Whatever differences there may be between * * * [different classes of] employees of the government * * * are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress. * * * The use of the constitutional power of regulation is for Congress, not for the courts.

Respondents' contention that the courts should "strike a different balance" (*Civil Service Commission* v. *Letter Carriers*, *supra*, 413 U.S. at 564) than the one struck by Congress and the Executive Branch should be rejected. While those branches might so

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nately, through preventive or prophylactic measures, * * * and * * * such regulation has been upheld even where fundamental freedoms are potentially affected * * *." In such cases the Court must "assume * * * that Congress may have been justified in its conclusion that alternatives to [the challenged regulation] * * * were inadequate." *Id.* at 271. Here, of course, no fundamental freedoms are affected by the challenged requirement (see p. 50, *supra*, n. 41).

choose, this Court ought not require them to do so, because "the balance it has so far struck is sustainable by the obviously important interests sought to be served by the [challenged] limitations * * *." *Ibid.*[57]

II. THE CHALLENGED REGULATION DOES NOT EXCEED THE AUTHORITY GRANTED BY CONGRESS AND IS NOT IN CONFLICT WITH APPLICABLE STATUTES OR EXECUTIVE ORDERS.

Both courts below rejected respondents' contentions that Section 338.101 of the Civil Service Commission's regulations exceeded the authority granted by Congress in the civil service laws and were inconsistent with other statutes and an executive order prohibiting discrimination in federal employment on the basis of "national origin." As we shall show, these rulings were correct.

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[57] The validity of the regulation is not affected by the fact that it applies only to positions in the competitive civil service. Occupants of other positions, such as the high-ranking policy positions, are ordinarily subject to a more extensive level of consideration and investigation, including in many instances the explicit requirement of approval by the Senate. The existence of such forms of high-level scrutiny, which is typically not present with respect to positions in the competitive civil service, may be thought to further without explicit compulsion the same interests that are served by the regulation.

A. The Civil Service Laws Authorized The Civil Service Commission To Establish Citizenship As A Criterion For Employment In The Federal Competitive Civil Service.

Section 338.101 of the Civil Service Commission's regulations here under challenge (*supra*, pp. 3-4) was promulgated by the Commission under the authority of Section 2.1 of Executive Order No. 10577 of November 22, 1954 (*supra*, p. 3). The authority for the issuance of that Order is derived largely from the Pendleton Civil Service Act of 1883 (22 Stat. 403), "the keystone in the present arch of Civil Service legislation * * *" (*Arnett* v. *Kennedy*, No. 72-1118, decided April 16, 1974, slip op. p. 14), which authorized the President to promulgate rules to carry the Act into effect, and created the present Civil Service Commission to aid the President in implementing the Act.

Prior to the Pendleton Act, there were few explicit legal requirements pertaining to employment by the Federal government. Although the first statute enacted by Congress required all officers of the United States to take an oath to support the Constitution (1 Stat. 24, as amended, 5 U.S.C. 3331), there was no explicit requirement of United States citizenship. Of course, as a result of policy and practice, selection of the relatively few employees of the federal government in the 19th Century was presumably limited principally to citizens even without explicit statutes or regulations.

In any event, federal positions became objects of political pressures and the "spoils" system of patronage, the abuses in which led to a reform movement that culminated in enactment of the Pendleton Act. See generally, *e.g.*, Rosenbloom, *Federal Civil Service and the Constitution* 19-69 (1971); United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present* 1-52 (1941); Van Riper, *History of the United States Civil Service* 11-95 (1958). Significantly, one of the earliest reform measures,[58] a short-lived provision enacted in 1856 for the appointment of consular pupils, had required that appointees be citizens of the United States (11 Stat. 55, repealed by 11 Stat. 160), and a similar explicit citizenship requirement was imposed with respect to all diplomatic or consular officers. 11 Stat. 60. A further effort at reform resulted in a rider to an appropriations act in 1871, which authorized the President "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate," and to "employ suitable persons to conduct such inquiries." 16 Stat. 514-515;[59] see Rev. Stat. 1753.

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[58] In 1853 Congress established a system of classification of clerks and provided that no clerks could be appointed by the Departments of Treasury, War, Navy, Interior, or Post Office unless they had been examined and found qualified by a board within the Department. 10 Stat. 209-211; see Rev. Stat. 164. In 1855 this requirement was extended to clerks at the Department of State. 10 Stat. 669.

[59] The statute provided in pertinent part:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service

President Grant then appointed a civil service commission which established a system of competitive examinations for employment and promotion. Due to the refusal of Congress to appropriate funds after 1874, the general examination system was suspended and the work of the commission continued only in a very limited, experimental basis. See S. Rep. No. 576, 47th Cong., 1st Sess., pp. V-VIII. Although the 1871 statute contained no explicit requirement of citizenship, the examinations conducted by this commission had been "open to every citizen * * *" (*id.* at VI) but not to non-citizens. See Appendix to S. Rep. No. 576, *supra*, at 24. The commission created under the 1871 enactment was superseded by the body created by the Pendleton Act.[65]

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of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

[65] The Pendleton Act provided in pertinent part (22 Stat. 403-406):

[T]he President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. * * *

SEC. 2. That it shall be the duty of said commissioners:

FIRST. To aid the President, as he may request, in

As presently codified, the pertinent provisions of the 1871 civil service law and the Pendleton Act state (5 U.S.C. 3301):

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preparing suitable rules for carrying this act into effect * * *.

SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

* * * * *

THIRD. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same. * * *

* * * * *

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes * * *.

The President may—

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

Although Section 3301 itself, unlike the Executive Order and the Commission's regulation, does not use the term "citizen" or "citizenship" as one of the qualifications for the admission to the civil service, the relevant legislative history of the Pendleton Act establishes convincingly that employment in the federal civil service could properly be limited to citizens.

As introduced by Senator Pendleton[81] and as reported out by the Senate Committee on Civil Service and Retrenchment, the bill was prefaced by a preamble setting forth the legislative purpose in the

[81] The bill was drafted by Dorman B. Eaton, Chairman of the Executive Committee of the New York Civil Service Reform Association, which was organized in 1877 to propose reforms in the civil service. Kaplan, *The Law of Civil Service* 9-10 (1958). Mr. Eaton was simultaneously the chairman of the civil service commission established by President Grant under the 1871 law. See Appendix to S. Rep. No. 576, *supra*, p. 12. After passage of the Pendleton Act, Mr. Eaton became the first Chairman of the Civil Service Commission. Kaplan, *supra*, at 10.

following language (S. Rep. No. 576, 47th Cong., 1st Sess., p. XII; emphasis added):

> Whereas common justice requires that, so far as practicable, *all citizens* duly qualified shall be allowed equal opportunities, on grounds of personal fitness, for securing appointments, employment, and promotion in the subordinate civil service of the United States * * *.

The preamble was omitted from the final bill for the reason that "[n]o preamble is necessary in a bill of this kind." 14 Cong. Rec. 661 (Statement of Senator Edmunds).

The Committee report also indicated an expectation that office-holders in the civil service would be "citizens." It stated (S. Rep. No. 576, *supra*, at XII):

> [C]itizens when they become office-holders do not cease to be citizens, or lose any of the rights or avoid any of the responsibilities of citizenship. * * * On the contrary, they are bound by an additional obligation to the performance of every duty of a good citizen. * * * None of the provisions of this bill, if it shall become a law, will make an officer less a citizen. All of its provisions will make him a better citizen, leading, encouraging, coercing him to the better performance of his own duties and to the elevation of the standard of excellence of those above and below him in the rank of official station.

Dorman Eaton, the original draftsman and principal proponent of the Pendleton bill, and later the first Chairman of the Commission (see p. 76, *supra*,

n. 61), repeatedly expressed the view that only citizens would qualify for civil service positions. See Appendix to S. Rep. No. 576, *supra*, at 6, 15, 22-26.[62]

The Congressional debates on the Pendleton bill also leave no doubt that Congress understood and meant that eligibility for admission to and appointment in the competitive civil service could be confined to citizens.[63]

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[62] A companion bill introduced by Senator Dawes (S. 939) would have expressly provided that "appointments are open to competition to any citizen of the United States, male or female. * * * [V]acancies shall be filled by competitive examinations open to all citizens, in conformity with the provisions of this act * * *." Appendix to S. Rep. No. 576, *supra*, at 4. The Dawes bill was criticized before the Senate Committee on the ground, among others, that it undertook to spell out the qualifications of applicants for civil service positions; it was Mr. Eaton's view that qualifications should be established by the President through his rule-making powers, as had been done earlier under the 1871 act. Appendix to S. Rep. No. 576, *supra*, at 24.

[63] See, *e.g.*, 14 Cong. Rec. 243 (Sen. Hawley: "It will be among the duties of the commission to devise rules for conducting examinations * * *. There will be requirements—anybody can think of a few in a moment—*the applicant must be a citizen of the United States*"); *id.* at 280 (Sen. Brown: "[L]et *every citizen* who feels that he has claims superior to an inferior man now in position go and compete for the prize"); *id.* at 321 (Sen. Miller: "[*E*]*very citizen* * * * shall have an equal opportunity for public employment"); *id.* at 361 (Sen. Jones: "It is intended to extend the power of appointment so as to embrace *all American citizens*"); *id.* at 566 (Sens. Brown and Pugh, proposed amendment: "And all persons now in the Civil Service thus classified are subject, *like all other citizens*, to the operations of this act; * * * there shall be appointed * * * an equal number of persons, who shall be, when appointed, *bona fide citizens*"); *id.* at 607 (Sen. Hoar: the Commissioners "are to present him, by selection and examination from the entire country on the ground of merit, *certain citizens* whose capacity for office and fitness they have ascertained") (emphasis added).

Pursuant to the Pendleton Act, President Arthur promulgated the first Civil Service Rules on May 7, 1883. Rule XI provided in pertinent part:

> Every application, in order to entitle the applicant to appear for examination or to be examined, must state, under oath, the facts on the following subjects: 1. Full name, residence, and post office address. 2. *Citizenship.* * * * [*First Report of the United States Civil Service Commission* 47 (1884) (emphasis added)].[64]

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[64] In its first report to Congress, the Commission gave the following explanation of the procedures it had adopted for holding competitive examinations:

> The application thus filled is returned to the Commission or to the proper Examining Board, and if its statements show that the applicant is regularly vouched for, and *that he is entitled by* age, health and *citizenship to be examined* for the service he seeks, his name is entered upon the proper record, with the date of his application, and his paper is placed on file. When the next examination is held, at a point which seems convenient for him, he is notified to be present. [*First Report of the United States Civil Service Commission* 19 (1884) (emphasis added)].

The "Instructions to Applicants who wish to Enter the United States Civil Service," reprinted in the *Second Report of the United States Civil Service Commission* 83 (1885), stated in pertinent part (emphasis added):

> WHO MAY BE EXAMINED.—(1) Only *citizens of the United States* of the proper age can be admitted to the examinations, and no person habitually using intoxicating beverages to excess can be appointed.

The original Rules were revised, renumbered and amended in the ensuing years. In a revision of the Rules undertaken in 1894 (*Twelfth Report of the United States Civil Service Commission* 10 (1894-1895)), the citizenship qualification was reworded and included in Rule V of the Civil Service Rules of May 6, 1896:

> 1. Every applicant for examination must be a *citizen of the United States*, must be of proper age, and must make an application under oath, upon a form prescribed by the Commission, and accompanied by such certificates as may be prescribed [*Thirteenth Report of the United States Civil Service Commission* 57 (1895-1896) (emphasis added)].

Rule V was amended in 1903 by President Theodore Roosevelt to permit persons who "owe allegiance to the United States" to qualify for the competitive civil service.[63] *Twentieth Report of the United States Civil Service Commission* 48 (1904).[64]

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[63] The Civil Service Commission explained that this amendment was designed to make eligible for the civil service persons in Puerto Rico and in the Philippines (*Twentieth Report*, *supra*, at 9), who then had the status of non-citizen nationals of the United States (see p. 4, *supra*, n. 1).

[64] By Executive Order No. 458, on June 13, 1906, President Roosevelt again amended Rule V by adding the following proviso:

> *Provided*, That when an examination has been duly announced to fill a vacancy and there is lack of eligibles who are citizens, the Commission may, in its discretion, examine persons who are not citizens, but they shall not be certified for appointment so long as citizens are eligible [*Twenty-Third Annual Report of the United States Civil Service Commission* 92 (1906)].

Prior to this general authorization to examine aliens, an executive order waiving the citizenship requirement had been necessary if an alien were to be hired because of a lack of qualified citizens. See, *e.g.*, Executive Order No. 434, March 28, 1906.

Section 2.1(a) of Executive Order No. 10577, issued by President Eisenhower on November 22, 1954 (19 Fed. Reg. 7521), continues in force to this day the requirement that the Civil Service Commission establish standards with respect to citizenship (*supra*, p. 3); the Commission, in turn, has continued until the present the general requirement that a person may be admitted to the competitive examination, and may be given appointment, only "if he is a citizen of or owes permanent allegiance to the United States." 5 C.F.R. 338.101(a), (b), see *supra*, pp. 3-4).[67]

Exceptions can be made with the approval of the Commission in cases of a limited executive assignment under 5 C.F.R. 305.509[68] in the absence of

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[67] The phrase "owes permanent allegiance to the United States" is interpreted by the Commission to be currently applicable only to natives of American Samoa (see p. 4, *supra*, n. 1).

[68] Section 305.509 provides in pertinent part:

> *Limited executive assignments.*
>
> (a) *Authorization.* The Commission may authorize an agency to fill a position by limited executive assignment when:
>
> (1) The position is expected to be of limited duration, or

qualified citizens, or, "in rare cases," under 5 C.F.R. 316.601,[68] unless appointment is prohibited by statute. 5 C.F.R. 338.101(b)(1), (2).

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(2) The agency establishes an unusual need for urgent staffing that cannot adequately be met under the procedures required for career executive assignments.

(b) *Time limit.* The Commission shall specify a time limit within which an agency may use an authority for limited executive assignment, and may revoke the authority at any time.

(c) *Tenure and status.* An employee may serve a maximum of 5 continuous years and does not acquire competitive status under limited executive assignment.

The provision authorizing limited executive assignments of aliens pursuant to Section 305.509 was added to Section 338.101 in 1968. 33 Fed. Rep. 12417.

[68] Section 316.601 provides:

Appointment without competitive examination in rare cases.

(a) The Commission may authorize an agency to make an appointment without competitive examination when the Commission:

(1) Finds that the duties and compensation of the position are such, or that qualified persons are so rare, that in the interest of good civil service administration the position cannot be filled through open competitive examination; and

(2) Receives satisfactory evidence of the qualifications of the person to be appointed.

(b) A person appointed under paragraph (a) of this section does not acquire a competitive status on the basis of that appointment.

(c) When a position filled under paragraph (a) of this section becomes vacant, the agency may fill the vacancy by another appointment under paragraph (a) of this section only with the express prior approval of the Commission in accordance with this section.

The provision authorizing appointment of aliens without competitive examinations pursuant to Section 316.601 was added to the predecessor of Section 338.101 in 1954. 19 Fed. Reg. 8608.

However, most components of the civil service—whether in the competitive service or the "excepted service" [69]—are now subject to statutory limitations on the employment of aliens in the continental United States contained in provisions in appropriation legislation similar to restrictions enacted annually since 1938.[71] The restriction in effect at the time this action was begun was contained in Section 502 of the Public Works Appropriation Act, 1970, 83 Stat. 336 (see p. 7, *supra*, n. 8). In language almost identical to that used in the appropriation acts of 1938, it prohibits the use of appropriated funds for payment of salaries to almost all alien employees of the United States whose post of duty is in continental United

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[69] Position in the excepted service—*i.e.*, "positions other than those of a confidential or policy-determining character for which it is not practicable to examine, and which are excepted from the competitive service" (5 C.F.R. 213.3101 (a))—may be filled by aliens in the absence of qualified citizens and with the approval of the Commission. 5 C.F.R. 213.3102(bb).

[71] Treasury-Post Office Appropriation Act, 1939, 52 Stat. 148; Appropriation Act for Departments of State, *et al.*, 1939, 52 Stat. 289-290; Independent Offices Appropriation Act, 1939, 52 Stat. 435; Second Deficiency Appropriation Act, 1938, 52 Stat. 1162-1163.

States without limitation as to whether they are competitive civil service employees."[72]

The basic prohibition of these annual appropriations provisions reinforces the policy reflected in the Commission's regulation, and the exceptions have the effect of merely authorizing payment of salaries to aliens who might otherwise be eligible for federal civil service employment."[73]

From the preceding discussion of the history of the pertinent federal civil service laws and regulations,

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[72] The appropriation act, like many of its predecessors, makes exceptions for temporary employment and employment of nationals of specified countries, including those allied with the United States in its current defense effort. 83 Stat. 336-337.

Congress has on many occasions recognized the general limitations on employment of aliens in the continental United States by enacting a variety of statutory exceptions thereto, in either permanent legislation or annual appropriation acts. *E.g.*, 10 U.S.C. 7473 (Department of the Navy—scientific and technical positions); 20 U.S.C. 46a (Smithsonian Institution—scientific and technical positions); 22 U.S.C. 1044(e) (Department of State—Foreign Service Institute); 42 U.S.C. 2473(b)(10) (National Aeronautics and Space Administration—all employment); 84 Stat. 1489 (Department of Agriculture—Foreign Agricultural Service); 84 Stat. 2029 (Department of Defense—all employment); 84 Stat. 890 (Atomic Energy Commission—all employment); 84 Stat. 1059 (Foreign Claims Settlement Commission—all employment); 84 Stat. 1061 (United States Information Agency—translators); 84 Stat. 823 (Library of Congress—up to ten positions).

[73] Indeed, the identical provision of the Treasury, Postal Service and General Government Appropriation Act of 1973, 86 Stat. 487, as well as 5 C.F.R. 338.101, were held unconstitutional in *United States Civil Service Commission* v. *Ramos*, No. 74-216, appeal docketed.

it is abundantly clear that Congress expected that the Civil Service Commission might require citizenship as a qualification for the competitive civil service, and that, with the full knowledge of Congress, the Commission has maintained such a requirement from the outset of its existence.

The original Civil Service rules thus represented a "contemporaneous construction" of the Commission's own enabling legislation by administrators who "participated in drafting" the Pendleton Act (see p. 76, *supra*, n. 61) and "directly made known their views to Congress in committee hearings," which therefore is entitled to very great weight. *Zuber* v. *Allen*, 396 U.S. 168, 192. In addition, the administrative practices, being known to Congress, having "long continued without substantial change, [and] applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Boehm* v. *Commissioner*, 326 U.S. 287, 291-292; see *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 658. Accordingly, both the district court (Pet. App. B 29a-31a), and the court of appeals (Pet. App. A 4a-6a) correctly rejected respondents' arguments that the Commission's regulations exceed its statutory authority, or conflict with later appropriation acts.

B. The Limitation On Employment Of Aliens In The Federal Competitive Civil Service Does Not Conflict With Statutory Provisions Or Executive Orders Banning Discrimination In Employment On Grounds Of "National Origin."

Respondents also argued in the district court and on appeal, that Section 338.101 of the Commission's regulations conflicts with Executive Order No. 11478, 34 Fed. Reg. 12985 (1969) (A. 21-22), which prohibits discrimination in the federal civil service on the basis of "national origin." That argument, rejected by both courts below (Pet. App. B 28a; Pet. App. A 7a-12a), requires little discussion.

That the term "national origin" in Executive Order No. 11478 refers solely to ethnic or geographic origin, and not to alienage, is indicated by the fact that the 1954 Executive Order providing for citizenship requirements in civil service employment (*supra*, p. 3) was not among those designated as having been affected by Executive Order No. 11478.

Moreover, only last Term this Court held that "national origin" was not synonymous with "alienage," as used both in the Civil Rights Act of 1964 and in the Equal Employment Opportunity Act of 1972, which extended to the federal government the prohibition of the 1964 Act against employment discrimination based on "national origin."

Thus, in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, the Court held that an employer's refusal to hire a person because he is not a United States citizen does not constitute employment discrimination on the basis of "national origin" in violation of Section 703 of

the Civil Rights Act of 1964. 42 U.S.C. 2000e-2(a)(1). The Court's construction of the statutory language was based in part on the legislative history of the Act, and in large measure on the Executive Branch's long-standing practice of not equating "national origin" with "alienage." The Court found "compelling reasons" to believe that Congress did not intend the term "national origin" to embrace citizenship requirements, by pointing to the exclusion of aliens from the federal civil service (414 U.S. at 89-91; footnote omitted):

> But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin, even though since 1943, various Executive Orders have expressly prohibited discrimination on the basis of national origin in Federal Government employment. See, e.g., Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943); Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969).
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> Moreover, § 701(b) of Tit. VII, in language closely paralleling § 703, makes it "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of . . . national origin . . . ." Civil Rights Act of 1964, Pub. L. 88-352, § 701(b), 78 Stat. 254, re-enacted, Pub. L. 89-554, 80 Stat. 523, 5 U. S. C. § 7151. The legislative history of that section reveals no mention of any intent on Congress' part to reverse the longstanding practice of requiring federal employees to be United States citizens. To the contrary, there is every indication that no such reversal was

intended. Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment. The Treasury, Postal Service, and General Appropriation Act of 1973, for example, provides that "no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States." Pub. L. 92-351, § 602, 82 Stat. 487. See also Pub. L. 91-144, § 502, 83 Stat. 336; Pub. L. 91-439, § 502, 84 Stat. 902.

To interpret the term "national origin" to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith. * * * So far as federal employment is concerned, we think it plain that Congress has assumed that the ban on national-origin discrimination in § 701(b) did not affect the historical practice of requiring citizenship as a condition of employment. * * * And there is no reason to believe Congress intended the term "national origin" in § 703 to have any broader scope.

In *Morton* v. *Mancari*, *supra*, the Court characterized the 1972 extension of the Civil Rights Act to government employment as being largely "a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery." Slip op. p. 13. As the Court's unanimous opinion stated (*id.* at 13-14):

There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had coexisted with broad anti-discrimination provisions in Executive Orders.

Espinoza and *Mancari* thus demonstrate that the longstanding use of citizenship as a criterion for federal employment has not been invalidated by the "national origin" provisions contained in Executive Orders or in recent Congressional enactments.

CONCLUSION

The concurrent decisions of Congress and the Executive Branch generally to limit employment of aliens in federal civil service is within the broad powers of the National government both to regulate the conduct of aliens prior to naturalization and to establish the conditions under which persons may exercise a privilege of national citizenship by participating in the affairs of that government as a civil servant. The distinction is rational, is supported by compelling governmental interests, and does not deprive aliens of liberty or property without due process of law. Accordingly, the judgment of the court of appeals should be reversed.

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APPENDIX

Acts of Congress codified in the United States Code, 1970 ed., drawing distinctions between citizens and resident aliens.*

Title 5, Government Organization and Employees:

Sec. 5912. Citizen employees stationed in foreign countries eligible for free use of Government owned or rented quarters.

Sec. 5922. Citizen employees stationed in foreign areas may be authorized certain allowances and differentials.

Sec. 5924. Dependents of citizen employees stationed in Canal Zone authorized certain allowances in connection with travel to and from U. S. schools.

Sec. 7532. Citizens who have been suspended or removed from certain Government agencies are afforded additional procedural rights in appealing suspension or removal, which rights are denied to aliens.

Sec. 8339. Affords certain citizens advantages in computation of annuity upon civil service retirement.

Title 7, Agriculture:

Sec. 1158. Citizens only entitled to indirect protection against foreign expropriation of property.

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* Excluding Title 8, "Aliens and Nationality."

Sec. 1704. Authorizes sale of foreign currencies for dollars to citizens for certain purposes.

Sec. 1922. Secretary of Agriculture authorized to make certain real estate loans only to farmers and ranchers who are citizens.

Sec. 1941. Secretary of Agriculture authorized to make certain operating loans only to farmers and ranchers who are citizens.

*Sec. 1961. Secretary of Agriculture authorized to make certain emergency loans only to farmers, ranchers, or oyster planters who are citizens.

Title 10, Armed Forces:

Sec. 311. Membership in militia restricted to citizens or those declaring intent to become same.

Sec. 1486. Secretaries of military services may authorize use of U. S. mortuary services, on reimbursable basis, to certain citizens dying abroad.

Sec. 2101, *et seq.* Participation in certain Reserve Officer Training programs restricted to citizens.

Sec. 2272. Secretaries of military departments precluded from awarding contracts in aircraft design competition to other than citizens.

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* Declared unconstitutional in *Cabrera* v. *Butz*, D.P.R., Civ. No. 326 (3-judge court), appeal to the Supreme Court noted.

Sec. 2279. Employment of aliens by contractors engaged in aircraft or aircraft parts production for the United States restricted.

Secs. 2668, 2669. Secretaries of military departments authorized to grant citizens certain easements for rights-of-way with respect to public lands withdrawn or reserved for use of such departments.

Sec. 2734. Aliens and foreign states or their political subdivisions may assert tort claims against U. S. in certain cases where citizens may not.

Sec. 3253. Aliens may enlist in Army only subject to certain restrictions.

Sec. 3285. Original appointments in Regular Army limited to citizens.

Sec. 3294. Medical and Dental Corps officers in Regular Army must be citizens.

Sec. 4308. Citizens only eligible for certain marksmanship instruction.

Sec. 5571. Citizenship a prerequisite for appointment as an officer in Regular Navy or Marine Corps.

Sec. 6019. Officers of vessels of the United States must be citizens.

Sec. 6909. Citizenship a prerequisite for certain direct officer procurement programs.

Sec. 6911. Citizenship a prerequisite for enlistment as naval aviation cadet.

Sec. 7435. Aliens may be denied interest in certain U. S. naval fuel reserves, unless foreign

country grants reciprocal rights to U. S. citizens.

Sec. 8253. Aliens must meet additional requirements for enlistment in Air Force.

Sec. 8257. Citizenship necessary for qualification as Regular Air Force aviation cadet.

Sec. 8285. Citizenship necessary for commission in Regular Air Force.

Sec. 8294. Citizenship necessary for commission as officer in Regular Air Force as medical or dental officer.

Title 12, Banks and Banking:

Sec. 72. Directors of national banking associations must be citizens.

Sec. 614. Directors of banks organized to engage in foreign banking must be citizens.

Sec. 619. Controlling interest in banks engaged in foreign business must be held by citizens.

Sec. 636c. Citizenship required for membership on Federal Farm Credit Board.

Sec. 673. Directors of Federal land banks must be citizens.

Sec. 1427. Directors of Federal home loan banks must be citizens.

Sec. 1812. Two of the three Directors of the Federal Deposit Insurance Corporation must be citizens.

Title 13, Census:

Sec. 22. Permanent officers and employees of Bureau of Census must be citizens.

Title 14, Coast Guard:

Sec. 371. Citizenship necessary for enlistment as Coast Guard aviation cadet.

Sec. 823. Coast Guard Auxiliary shall be composed of citizens.

Title 15, Commerce and Trade:

Sec. 144. Majority of incorporators of China Trade Act corporation must be citizens.

Sec. 149. Majority of directors of China Trade Act corporation must be citizens.

Sec. 1124. Protects citizens from importation into U. S. of certain goods bearing infringing trademarks.

Sec. 1126. Citizens and nationals of foreign countries extending reciprocal rights entitled to certain trademark protection benefits.

Sec. 1404. Director of National Traffic Safety Bureau shall be citizen.

Title 16, Conservation:

Sec. 5. Citizens eligible for certain rights-of-way through public lands for power and communications facilities.

Sec. 420. Only citizens eligible for power and communication facility rights-of-way through certain military parks.

Sec. 463. Advisory Board on National Parks, Historic Sites, Buildings, and Monuments, to be composed of citizens only.

Section 468b. General trustees of National Trust for Historic Preservation in the United States must be citizens.

Sec. 522, *et seq.* Only citizens and U. S. corporations and associations eligible for certain rights-of-way through National Forests for electrical plants, mining, etc.

Sec. 554. Forest supervisors and rangers must be selected from among qualified citizens of the States or Territories in which national forests are located.

Sec. 715k. Reservation protectors must be selected, when practicable, from qualified citizens of State in which to be employed.

Sec. 742c. Only citizen or national eligible for fishery loan.

Sec. 781. Aliens not included in prohibition against certain fishing beyond state territorial limits.

Sec. 797. Only citizens eligible for certain loans from Federal Power Commission.

Sec. 831a. Only citizens may be members of board of directors of Tennessee Valley Authority.

Sec. 1052. Educational and scientific facilities of National Fisheries Center and Aquarium available to aliens in certain cases only if reciprocity.

Sec. 1106. Only U. S. and Canadian citizens may be employees of Joint United States-Canadian Commission.

Title 18, Crimes and Criminal Procedure:

Sec. 242. Criminal sanctions imposed on one who conspires to injure a citizen in the exercise of certain rights.

Sec. 243. Citizens may not be disqualified from jury service on basis of race, color, etc.

App. Sec. 1202(a)(5). Aliens illegally in U. S. are criminally liable for receipt, possession, or transportation of firearms.

Sec. 4321. Board of Advisers of Federal Reformatory for Women to be composed of four citizens and others, as designated.

Title 19, Customs Duties:

Sec. 1330. Membership on U. S. Tariff Commission limited to citizens.

Sec. 1526. Protects citizens against trademark infringement.

Sec. 1586. Prohibition against unloading vessel within specified off-shore waters applicable only to citizens.

Sec. 1641. Custom house brokers required to be citizens.

Title 20, Education:

Sec. 46a. Secretary of Smithsonian Institution may employ aliens in a scientific or technical

capacity only where no qualified citizen available.

Sec. 72. The five general trustees of the National Gallery of Art must be citizens.

Sec. 77. Certain members of the National Air and Space Museum must be citizens.

Sec. 107a. Secretary of Health, Education and Welfare shall assist blind citizens to obtain concession licenses on Federal and other property.

Title 22, Foreign Relations and Intercourse:

Sec. 287n. U. S. representatives to the General Conference of UNESCO must be citizens.

Sec. 287p. Members of the National Commission on Educational, Scientific, and Cultural Cooperation must be citizens.

Sec. 526. Secretaries of Army and Navy shall protect patent rights of citizens in sales of war materials.

Sec. 816. Secretary of State may establish educational facilities for children of certain citizens stationed overseas.

Sec. 910. Foreign Service Officers must be citizens.

Sec. 922. Foreign Service Reserve Officers must be citizens.

Sec. 939. Foreign Service Staff Officers and employees must be citizens.

Sec. 1044. Secretary of State may employ noncitizens in Foreign Service Institute only in absence of suitably qualified citizens.

Sec. 1131. Secretary of State authorized to grant citizen officers and employees of Foreign Service certain representation allowances.

Sec. 1156. Secretary of State may authorize payments of certain medical expenses for citizen officers, employees, and their dependents stationed abroad.

Sec. 1157. Secretary of State may authorize payment of travel expenses in connection with medical treatment involving citizen Foreign Service officers, employees, and dependents stationed abroad.

Sec. 1158. Secretary of State shall provide for certain physical examinations of citizen Foreign Service officers, employees, and dependents stationed abroad.

Sec. 1177. Citizens dying abroad entitled to consular assistance following testamentary directions.

Sec. 1198. Consular officers liable for embezzlement of certain funds of citizens.

Sec. 1321, *et seq.* Certain citizens given nonquota immigrant status and other rights in Philippines.

Sec. 1448. Secretary of State may provide assistance to certain overseas institutions founded or sponsored by citizens.

Sec. 1451. Secretary of State may assign certain citizen employees to work with foreign governments.

Sec. 1471. Secretary of State may hire certain aliens only when qualified citizens unavailable.

Sec. 1631g. Certain debt claims may be made only by citizens.

Sec. 1641. Aliens denied access to certain claims funds.

Sec. 1796. Members of Joint Commission on Rural Reconstruction in China must be citizens.

Sec. 2103. President may appoint certain committees, composed only of citizens, to provide for international cooperation in health and medical research.

Sec. 2174. President may furnish certain assistance to schools, libraries, and hospital services overseas, if founded or sponsored by citizens.

Sec. 2198. Eligible investors in Overseas Private Investment Corporation generally limited to citizens or corporation controlled by citizens.

Sec. 2281. Joint Commissions on Rural Development to be composed of one or more citizens.

Sec. 2351. President shall assist citizens in obtaining just compensation for certain losses incurred in the course of international trade.

Sec. 2370. Assistance to certain foreign countries restricted where rights of citizens have been prejudiced.

Sec. 2385. President may appoint a citizen to the Inter-American Committee on the Alliance for Progress.

Sec. 2391. Chairman of Development Assistance Committee must be a citizen.

Sec. 2504. President may enroll citizens and nationals as Peace Corps "volunteers" for service abroad.

Sec. 2505. Peace Corps "volunteer leaders" must be citizens or nationals.

Sec. 2670. Secretary of State may pay costs involved in rescue of certain citizens.

Title 25, Indians:

Sec. 399. Lease of unallotted mineral lands within Indian reservations available to citizens.

Title 26, Internal Revenue Code:

Secs. 891, 896. Permits multiple taxation of aliens whose countries discriminate against U. S. citizens.

Sec. 911. Only citizens qualify for certain exemptions on income earned without the U. S.

Sec. 931. Citizens and domestic corporations qualify for certain exemptions on income derived from sources within U. S. possessions.

Sec. 941. China Trade Act corporations eligible for special deduction from taxable income for certain shares held by citizens.

Sec. 981. Only citizens may elect to receive certain benefits as to treatment of income subject to foreign community property laws.

Sec. 2014. Credit for foreign death taxes available to aliens only if reciprocity.

Sec. 6851. Alien may not generally depart the U. S. unless he first procures a certification that he has complied with all obligations imposed upon him by the income tax laws.

Sec. 7325. Appraisers of seized goods must be citizens.

Title 28, Judiciary and Judicial Procedure:

Sec. 1251(a)(2). Supreme Court has original and exclusive jurisdiction of all actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants.

Sec. 1251(b)(1). Supreme Court has original but not exclusive jurisdiction of all actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties.

Sec. 1251(b)(3). Supreme Court has original but not exclusive jurisdiction of all actions or proceedings by a State against aliens.

Sec. 1332. Suits between aliens only do not qualify for diversity of citizenship under this section.

Sec. 1350. District Courts have original jurisdiction in civil actions by aliens only for torts committed in violation of the law of nations or a treaty.

Sec. 1351. District courts have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states.

Sec. 1391. Aliens subject to suit in any district.

Sec. 1442(b). Personal action commenced in State court by an alien against any citizen of a State who is a civil officer of the United States and is a nonresident of such State removable to federal district court.

Sec. 1861. Only citizens eligible to serve on grand and petit juries in district courts.

Sec. 1862. Citizens may not be excluded from grand or petit jury service on account of race, religion, etc.

Sec. 1863. Jury commissions to be composed of citizens only.

*Sec. 1865. Grand or petit jurors in district court must be citizens.

Sec. 1872. Issues of fact to be tried by a jury in all original actions at law against citizens in the Supreme Court.

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* Constitutionality upheld in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md.), appeal pending No. 73-1915.

Sec. 2502. Aliens may prosecute actions in Court of Claims only if they establish reciprocity as a jurisdictional prerequisite.

Title 30, Mineral Lands and Mining:

Sec. 22. Mineral deposits on U. S. owned lands open to exploration and purchase only by citizens and those declaring intent to become same.

Sec. 49a. Only citizens, and those declaring intent to become same, obtain benefit of U. S. mining laws as made applicable to Alaska.

Sec. 71. Only citizens, and those declaring intent to become same, have right to enter certain coal lands of the U. S.

Sec. 181. Certain mineral deposits on lands owned by the U. S. may be disposed of only to citizens of U. S., and to foreign citizens where reciprocal rights exist.

Sec. 323. Citizens may not be prevented from using patents acquired by the Secretary of Interior under this section.

Sec. 1015. Leases for use of geothermal resources to be issued only to citizens and certain associations and corporations organized under the laws of the U. S.

Title 31, Money and Finance:

Sec. 492a. Disbursing officers in foreign countries authorized to cash checks drawn on the

Treasurer of the United States for the accommodation of citizens only.

Title 32, National Guard:

Sec. 313. Officers in National Guard must be citizens.

Title 33, Navigation and Navigable Waters:

Sec. 8. Citizens entitled to toll-free use of certain Alabama rivers.

Sec. 702d-1. Secretary of Army authorized to grant certain easements only to citizens.

Title 36, Patriotic Societies and Observances:

Sec. 25. Executive Board of Boy Scouts of America to be composed of citizens.

Sec. 34. Members of National Council of Girl Scouts of America shall be citizens.

Sec. 45. Membership in American Legion restricted to citizens.

Sec. 97. Membership in American War Mothers restricted to citizens.

Sec. 341. Certain citizens designated members of American Society of International Law.

Sec. 426. Members of Corregidor Bataan Memorial Commission must be citizens.

Title 38, Veterans' Benefits:

Sec. 235. Citizen employees of the Veterans Administration assigned to Philippines and

Europe entitled to certain allowances and benefits.

Sec. 624. Only citizen veterans eligible for certain medical services abroad.

Sec. 1502. Veterans eligible for certain vocational rehabilitation only if they were citizens at the time of service.

Sec. 4105. Only citizens eligible for appointment to certain positions in Department of Medicine and Surgery, unless qualified citizens not available (38 U.S.C. 4114).

Title 40, Public Buildings, Property, and Works:

Sec. 71a. National Capitol Planning Commission to be composed of 5 citizens, and other designated persons.

Sec. 782. Ownership, operation, or control by aliens of certain U. S. long-lines communication facilities in Alaska prohibited.

Title 41, Public Contracts:

Sec. 49. Defense contractors required to accept certificate of honorable discharge from U. S. armed forces as equivalent to birth certificate, except in case of aliens.

Title 42, The Public Health and Welfare:

Sec. 204. Commissioned officers in the Public Health Service must be citizens.

Sec. 417(h). Only citizens shall be considered World War II veterans for purposes of certain benefits.

Sec. 428. Only citizens and aliens admitted for permanent residence and residing in U. S. for five years eligible for certain pension benefits at age 72.

Sec. 1313. Only destitute citizens and dependents thereof entitled to receive temporary assistance upon return to U. S. from foreign countries.

*Sec. 1395. Only citizens and aliens admitted for permanent residence and having resided continuously in U. S. for five years eligible for supplementary medical insurance benefits.

Sec. 1396. Citizens may not be excluded from State medical assistance plans.

Sec. 1869. Only citizens and nationals eligible for certain scientific scholarships.

Sec. 1922. Only citizens eligible for Department of Justice medals for character and service.

Sec. 1971. Voting rights of citizens only protected.

Sec. 1973. Voting rights of citizens may not be denied or abridged on account of race or color.

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* Declared unconstitutional in *Diaz* v. *Weinberger*, 361 F. Supp. 1 (S.D. Fla.), appeal pending sub nom. *Weinberger* v. *Diaz*, No. 73-1046, probable jurisdiction noted May 13, 1974.

Sec. 1975. Commission on Civil Rights shall investigate allegations that citizens have been denied voting rights.

Sec. 1982. Property rights of citizens protected.

Sec. 2031. Members of Atomic Energy Commission must be citizens.

Sec. 2133. Issuance of atomic energy licenses to aliens or alien owned or controlled corporation prohibited.

Sec. 2134. Issuance of atomic energy licenses for purposes of medical therapy, etc., to alien owned or controlled corporations prohibited.

Title 43, Public Lands:

Sec. 145. Secretary of Interior empowered to sell certain public land to citizens.

Sec. 161. Homestead land grants available to citizens and those declaring intent to become same.

Sec. 178. Only citizens may obtain title to certain lands in New Mexico by adverse possession.

Sec. 231. Certain citizen entrymen eligible for optional leave of absence from homestead lands.

Sec. 270. Only citizens eligible for certain homestead rights in Alaska.

Sec. 272a. Soldiers' and sailors' homestead rights restricted to citizens.

Sec. 315b. Grazing permits available only to citizens and those filing necessary declaration of intent to become same.

Sec. 321. Rights in desert-lands available to citizens and those declaring intent to become same.

Sec. 329. Land patents available only to citizens.

Sec. 364c. Membership on advisory committees to Board on Geographic Names restricted to citizens.

Sec. 375. Land patents available only to citizen bidders.

Sec. 682c. Leases and sales of public lands may be made only to citizens or to aliens who have filed a declaration of intent to become citizens.

Sec. 687a. Land purchases in Alaska limited to citizens.

Sec. 897. Relief granted to purchasers of patents from railroads when purchasers are citizens or have declared their intention to become same.

Sec. 898. Purchase rights extended only to citizens, and those declaring intent to become same.

Sec. 942-6. Certain rights-of-way in Alaska available only to citizens.

Secs. 956, 966. Rights-of-way through certain public lands available only to citizens.

Sec. 992, *et seq.* Citizens granted preferred right to file applications for purchase of certain meandered lands.

Sec. 1062. U. S. Attorney has duty to institute civil action on behalf of citizens only for improper closure of public lands.

Sec. 1092. Land patents in Oklahoma available only to citizens.

Sec. 1100. Mineral patents in Oklahoma available only to citizens.

Title 45, Railroads:

Sec. 543. Officers and directors of National Railroad Passenger Corporation must be citizens.

Title 46, Shipping:

Sec. 11. Establishes citizenship requirements with respect to registry of vessels engaged in coastwise trade and mail service contracts.

Sec. 13. Foreign built vessels admitted to coastwise trade only if owned by citizens.

Sec. 122. Citizen-owned coasting and fishing vessels not subject to duties.

Sec. 146. Goods exempt from discriminating duty if imported on citizen-owned vessels.

Sec. 221. Officers of U. S. vessels must be citizens.

Sec. 242. Registry as staff officer in U. S. merchant marine limited to citizens.

Sec. 785. Aliens may prosecute an action under the Suits in Admiralty Act only if they establish reciprocity as a jurisdictional prerequisite.

Sec. 834. Secretary of Treasury may deny clearance to vessels which refuse to accept freight of citizen.

Sec. 865. Secretary of Commerce may sell vessels to aliens only if unable to find a suitable citizen buyer.

Sec. 866. Preferences given to citizens in establishment and operation of certain steamship lines.

Sec. 922. Citizens given preference in obtaining ship mortgages.

Sec. 1126. Only citizens eligible for training in United States Maritime Service.

Sec. 1132. All licensed officers of U. S. documented vessels must be citizens; all crew members must be citizens if vessel built or operated with Government subsidy.

Sec. 1151. Only citizens may apply for vessel construction differential subsidies.

Sec. 1159. Only citizens may apply for aid in construction of new vessels.

Sec. 1160. In order for vessel to be "obsolete" for purposes of purchase by the Secretary of Commerce under this section, vessel must have been owned by a citizen for three years prior to purchase.

Sec. 1161. Only citizens eligible for certain construction reserve funds for vessels.

Sec. 1171. Only citizens eligible to apply for operating-differential subsidies where vessel to engage in foreign commerce.

Sec. 1177. Only citizens may enter into agreement with Secretary of Commerce to establish capital construction fund.

Sec. 1213. Citizens given preference in award of contracts under this chapter.

Sec. 1283. Only citizens qualify for certain war-risk insurance.

Sec. 1402. Only citizens may apply to Secretary of Interior for fishing vessel construction subsidies.

Title 47, Telegraphs, Telephones, and Radiotelegraphs:

Sec. 17. Only citizens may own, operate, or control telegraph lines in Alaska.

Sec. 154. Members of Federal Communications Commission must be citizens.

Sec. 222. Consolidation or merger of telegraph carriers, if more than one-fifth of capital stock will be owned, controlled or voted directly or indirectly by aliens as a result, prohibited.

Sec. 303. Aliens generally ineligible for radio station licenses.

Sec. 310. Aliens ineligible for amateur radio station license under certain circumstances.

Sec. 733. Directors and officers of the Communications Satellite Corporation must be citizens.

Sec. 734. Participation by aliens in Communications Satellite Corporation restricted.

Title 48, Territories and Insular Possessions:

Sec. 874. All judicial officials in Puerto Rico must be citizens.

Sec. 892. Resident Commissioner of Puerto Rico must be a citizen.

Sec. 1405p. Restricts franchise in Virgin Islands to citizens.

Sec. 1414. Citizens granted exclusive privileges with respect to obtaining and selling the products of certain guano deposits.

Sec. 1422. Governor and Lieutenant Governor of Guam must be citizens.

Sec. 1423f. Members of Guamian legislature must be citizens.

Sec. 1501, *et seq.* Right of aliens to acquire, own, or convey land in U. S. Territories, or U. S. public lands restricted.

Sec. 1509. Aliens ineligible to purchase public land in Hawaii unless they have declared their intent to become citizens.

Sec. 1542. Franchise in Virgin Islands restricted to citizens.

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Sec. 1321. Members of Civil Aeronautics Board must be citizens.

Secs. 1341, 1342. Administrator and Deputy Administrator of Federal Aviation Administration must be citizens.

Sec. 1401. Only citizens may register aircraft.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, *et al.*,
Petitioners,

v.

MOW SUN WONG, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

BRIEF FOR THE RESPONDENTS

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IN THE

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 500 F.2d 1031 (9th Cir. 1974). The opinion of the United States District Court is reported at 333 F.Supp. 527 (N.D. Cal. 1971).

QUESTIONS PRESENTED

1. Whether a regulation of the United States Civil Service Commission, which bars permanent resident aliens from employment in the federal competitive civil service, violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. Whether a regulation of the United States Civil Service Commission, which bars permanent resident aliens from employment in the federal competitive civil service, exceeds the authority provided by Congressional statutes and Presidential orders, and contravenes Executive Orders Nos. 10577 and 11478.

CONSTITUTIONAL, STATUTORY, REGULATORY AND EXECUTIVE ORDER PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the federal Civil Service Act, the federal Civil Service Commission regulations, and Presidential Executive Orders are set forth in the Brief for the Petitioners at pp. 2-4, with the following addition:

Executive Order No. 11478, 34 Fed. Reg. 12985 (August 8, 1969), which provides in relevant part:

> Sec. 1: It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to provide the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.
>
> Sec. 6: . . . This order does not apply to aliens employed outside the limits of the United States.

STATEMENT OF THE CASE

In 1970 the four respondents were rejected for federal employment solely because each was a permanent resident alien. The four together[1] filed the instant class action lawsuit to enjoin the United States Civil Service Commission from enforcing a regulation[2] which automatically prohibited them–because of their status as resident aliens–from applying for, let alone holding, any competitive civil service positions. Though each respondent had been admitted to the United States as a permanent resident alien, the regulation foreclosed them even from submitting an application for federal employment. Though each respondent possessed the qualifications required for the positions of janitor, file clerk, educational evaluator, and mail clerk, respectively, the regulation denied them any opportunity to utilize those abilities in federal civil service jobs.[3]

---

[1] The four respondents in this action are Mow Sun Wong, Siu Hung Mok, Francene Lum, and Kae Cheong Lui. A fifth plaintiff, Anne Yu, did not join the appeal in this case.

[2] 5 C.F.R. § 338.101 of the Civil Service Commission's regulations (reprinted at pp. 3-4 of the Brief for the Petitioners (October 1974)) [hereinafter referred to as "Pet. Br."].

[3] Since the federal government "is by far the largest single employer in the United States" (Das, "Discrimination in Employment Against Aliens–The Impact of the Constitution and Federal Civil Rights Act,", 35 *U. Pitt. L. Rev.* 499, 528 (1974)), the importance of federal employment opportunities to respondents and millions of other permanent resident aliens is obvious. As of April 1974, the domestic civilian federal work force totaled 2,708,131 employees (Bureau of Manpower Information System, Manpower Statistics Division, "Federal Civilian Manpower Statistics," p.5 (June 1974)), with more than 73,000 of these federal jobs in the San Francisco-Oakland Standard Metropolitan Statistical Area (*ibid.*). Moreover, each year, approximately 300,000 jobs in the federal civil service become available nationwide (A:9).

The backgrounds and employment experiences of the respondents demonstrate why the appellate court below found that no "compelling interest or proper government objective [exists] to justify the total exclusion of aliens from the federal competitive civil service." *Wong v. Hampton*, 500 F.2d 1031, 1039 (9th Cir. 1974). Before coming to the United States, respondent Mow Sun Wong had worked as an electrical engineer for over 10 years (A. 24). After entering this country as a resident alien, and unable to find work utilizing his engineering skills and experience, respondent Wong accepted the best job he could find: he began work in August of 1970 as a janitor under the California Supplemental Training and Education Program (STEP) (A.25). Through this program, which provides on-the-job training for its participants, respondent Wong was actually placed with a federal agency, the United States General Services Administration, to work as a janitor.[4] According to his supervisor, respondent Wong's performance in this federal job was "outstanding" (A.29), and his supervisor wished to hire him for a permanent federal position *(ibid.)*. Nevertheless, once the STEP program ended, respondent Wong was not even given an opportunity to compete for this janitorial position on any basis, since petitioners' regulation automatically prohibited the hiring of non-citizens in such federal employment.

A similar dilemma confronted respondent Siu Hung Mok. Before his arrival in the United States, he had 18 years of experience as a businessman in both China and

[4] The salaries of participants in the STEP project are paid by the California State job training program.

Macao (A.25). He also participated in the STEP project and was placed with a federal agency—as a file clerk with the Federal Records Center. His supervisor similarly found his work with the federal agency most satisfactory (A.26). Solely because of his alien status, however, respondent Mok was not allowed to be retained as a file clerk with the Federal Records Center after his STEP training program ended.

The alien status of respondent Francene Lum was likewise the sole reason why she was denied the opportunity even to apply for a position as an evaluator of educational programs with the United States Department of Health, Education and Welfare. Respondent Lum's educational background includes a bachelor of arts degree from Webster College, a masters degree in education from St. Louis University, and periods of graduate study at Stanford, Johns Hopkins, Kansas, and Seton Hall Universities (A.27). At the time the instant action was instituted, she had 15 years' experience as a teacher of mathematics and of Chinese as a second language to immigrants participating in a Manpower Development and Training Act project (*ibid.*). But, despite these impressive qualifications, she too was foreclosed from seeking any position with the federal government because she was not a citizen.

Finally, as the experience of respondent Kae Chong Lui shows, resident aliens are not even permitted to keep federal jobs if they should accidentally manage to obtain such positions. Respondent Lui was accepted by, and worked satisfactorily for, the United States Post Office loading and unloading mail (A.28). Yet, when the federal agency discovered—10 days after his hiring—that he was not a citizen, he was summarily

terminated from that job solely for that reason (*ibid.*).

The total exclusion of respondents from any employment opportunities with the federal government is tinged by the irony that three of them—respondents Wong, Mok, and Lui—actually worked for the government either through a joint federal-state manpower program or through administrative inadvertence. Nevertheless, though each performed excellently in his respective position, petitioners' regulation foreclosed them from using their abilities to continue in such federal jobs. A further irony emerges since permament resident aliens like respondents are subject to all the burdens and obligations that citizens bear, including the payment of taxes and service in the armed forces.[5] Yet, the bearing of such obligations has not been accompanied by the chance to share in the employment opportunities offered by the federal government.[6]

---

[5] *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973); *In re Griffiths*, 413 U.S. 717, 722 (1973).

[6] The experience of Tom Tung Bor reveals the anomalous situation in which resident aliens are placed. Arriving in this country as a child, Bor was drafted into the United States Army in 1969 and served 19 months—14 of those in Korea—before receiving an honorable discharge (A.31). During his military service, he achieved the rank of Sergeant E-5. Yet, upon returning to civilian life, he "was informed that the federal government would not hire me for any position, because I was not a citizen" (*ibid.*). The discrimination and frustration which confronted Bor are reflected in his statement that

> If the federal government deems me qualified and loyal enough to serve in its military, then I do not understand why I am not given the opportunity to be a qualified, loyal postal employee or the like (*ibid.*).

In their Complaint, respondents contended that petitioners' exclusionary regulation violated the Due Process Clause of the Fifth Amendment to the United States Constitution, exceeded the authority granted petitioners by the Congress and the President, and contravened Presidential orders[7] (A. 10-13). In a memorandum and order issued on August 30, 1971, the United States District Court for the Northern District of California rejected each of respondents' contentions and ruled on behalf of petitioners. 333 F.Supp. 527 (N.D. Calif. 1971). On appeal, the United States Court of Appeals for the Ninth Circuit reversed and held that the regulation violated the Due Process Clause of the Fifth Amendment. *Wong v. Hampton*, 500 F.2d 1031 (9th Cir. 1974). Guided by the "rationales and holdings" of this Court's decisions in *Sugarman v. Dougall*[8] and *Graham v. Richardson*[9] (*id.* at 1036-37), the Ninth Circuit found "[t]he broad sweep [of the regulation] is the vice" (*id.* at 1041). Examining the possible rationales for such a discriminatory regulation, the appellate court concluded that no "compelling

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[7] Executive Order No. 10577, 19 Fed. Reg. 7521 (Nov. 22, 1954); Executive Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

[8] 413 U.S. 634 (1973).

[9] 403 U.S. 365 (1971). The appellate court below recognized that while neither *Sugarman* nor *Graham* was

> squarely controlling (because they deal with the states' power to discriminate against aliens *vis-a-vis* the Fourteenth Amendment) [they] are instructive and significant . . . . *Wong v. Hampton, supra*, 500 F.2d at 1036-37.

government interest" or "logical or persuasive reason [has been] advanced as to why aliens should be excluded from all federal civil service employment" (*ibid.*).

SUMMARY OF ARGUMENT

Though the Bill of Rights contains no express equal protection provision, this Court has long recognized that the Due Process Clause of the Fifth Amendment embraces those equal protection guarantees made explicit in the Fourteenth Amendment. Similarly, in assessing the validity of federally drawn classifications under the Fifth Amendment, this Court has invoked the same standards which apply under the Fourteenth Amendment to classifications established by the states. In the instant case, petitioners' blanket exclusion of all permanent resident aliens from all employment opportunities in the federal competitive civil service must thus be subjected to the most stringent standard of judicial review. Since the discrimination suffered by respondents and millions of other resident aliens stems solely from the "suspect classification" of their resident alien status, petitioners must demonstrate that their regulation (5 C.F.R. §338.101) is necessary to promote a compelling government interest. As the appellate court below found, there can be no compelling interest sufficient to justify a regulation whose "overbreadth" and "broad sweep" serve to "automatically exclude all aliens from the competitive civil service." *Wong v. Hampton*, 500 F.2d 1031, 1040-1041 (9th Cir. 1974).

Such unjustified discrimination clearly violates the Due Process Clause of the Fifth Amendment.

Nevertheless, while it "would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (*Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)) with respect to discrimination against resident aliens in public employment, petitioners suggest to this Court that the Constitution imposes utterly no duties on them in this area. They contend that the federal government is exempt from Fifth Amendment strictures because of "its plenary power over immigration and naturalization" (Pet. Br. 42) and because the Privileges and Immunities Clause of the Fourteenth Amendment "authorizes preferred treatment for citizens" (Pet. Br. 28).

Such an argument is unsupportable both in logic and law. To recognize that Congress may have "plenary power" over a given area does not permit petitioners to ignore the Constitution–and judicial standards enforcing the Constitution–in implementing those powers. Similarly, nothing in the Privileges and Immunities Clause exempts the federal government from the constraints of the Fifth Amendment nor authorizes it to deny resident aliens rights accorded by that amendment. The Privileges and Immunities Clause was adopted to restrict state discrimination, not to authorize federal discrimination.

Finally, petitioners' discriminatory regulation also suffers from obvious non-constitutional violations. In totally barring resident aliens from all federal employment, petitioners have clearly exceeded their discretion to establish standards for admission into the federal civil service system. Neither the Congress nor the

executive has explicitly authorized such blanket discrimination. Similarly, by foreclosing resident aliens from all federal employment opportunities, petitioners directly contravene executive orders which were issued to prevent such discrimination. These executive orders likewise require that petitioners' regulation be held invalid.

ARGUMENT

I.

THE COMPLETE EXCLUSION OF RESIDENT ALIENS FROM ALL EMPLOYMENT OPPORTUNITIES IN THE FEDERAL COMPETITIVE CIVIL SERVICE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Over the years, this Court has carved out special judicial protection for resident aliens. The decisions of this Court "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372-373 (1971); see also *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). Yet, petitioners would have this Court abandon this special concern and uphold a regulation which explicitly forecloses resident aliens—solely because of their alien status—from seeking employment opportunities with the federal government. 5 C.F.R. §338.101. As this section of respondents' brief will show, the Due Process Clause of the Fifth Amendment will not tolerate such a discriminatory barrier.

A. The Due Process Clause of the Fifth Amendment Affords Equal Protection Guarantees Similar to Those in the Fourteenth Amendment.

Though no express equal protection guarantee exists in the Bill of Rights, this Court has clearly established that the Fifth Amendment contains equal protection guarantees similar to those made explicit in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, decided the same day as *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court applied the same equal protection standard enunciated in *Brown* to strike down racial segregation in Washington, D.C., public schools as violative of the Fifth Amendment. The "liberty" guaranteed by the Due Process Clause of the Fifth Amendment "extends to the full range of conduct which the individual is free to pursue" in relation to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). For the federal government to classify children on the basis of race not only deprives them of their liberty,[10] but

[10] It is significant that the "liberty" involved in *Bolling* was not the right to an education, but the right to receive equal educational opportunities. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-39 (1973). Similarly, respondents in this case do not suggest (contrary to petitioners' contention, Pet. Br. 50, n.41) that there is a right to public employment, but, rather, that the Fifth Amendment affords " 'a constitutional right to be free from unreasonably discriminatory practices with respect to such employment.' " *Wong v. Hampton, supra*, 500 F.2d at 1038. This Court itself has continually recognized that one of the most basic of all liberties is the right of a person, citizen or non-citizen, to be free to secure employment with equal opportunity. *E.g., Sugarman v. Dougall, supra*, 413 U.S. at 641; *Graham v. Richardson, supra*, 403 U.S. at 379-380; *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Smith v. Texas*, 233 U.S. 630, 636 (1914).

constitutes "discrimination . . . so unjustifiable as to be violative of due process." *Ibid.* To hold otherwise, this Court recognized, would have created a most anomalous situation. Because the *Brown* decision held

> that the Constitution prohibits the states from maintaining racially segregated public schools, it would be *unthinkable* that the same Constitution would impose a lesser duty on the Federal Government. *Id.* at 500 (emphasis added).[11]

Since *Bolling*, this Court has reaffirmed that the Constitution does not permit a double standard which would allow the federal government to engage in discriminatory practices foreclosed to the states. A long line of decisions reveals that this Court will not tolerate any distinctions between the standards appropriate for assessing the validity of state and federal classifications.[12] In *Shapiro v. Thompson*, this Court invoked

[11] *Accord, Frontiero v. Richardson*, 411 U.S. 677 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, after invalidating state residency requirements for welfare benefits as violative of equal protection, this Court employed the same "reasons" to strike down a similar federal residency rule, "even though it was adopted by Congress as an exercise of federal power." *Id.* at 641. In a concurring opinion, Mr. Justice Stewart observed it "is necessarily true" that a compelling government interest be shown,

> whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a . . . federal regulatory law, to be tested against the Due Process Clause. *Id.* at 644.

[12] *E.g., Johnson v. Robison*, ____ U.S. ____, 94 S. Ct. 1160, 1164, n.4 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 680, n.5 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). See also *Wong v. Hampton, supra*, 500 F.2d at 1038.

the stringent compelling governmental interest test in striking down state residency requirements for welfare benefits as violations of the Equal Protection Clause of the Fourteenth Amendment. 394 U.S. 618 (1969). The *Shapiro* decision, in also invalidating similar requirements imposed by the District of Columbia, imposed the same stringent constitutional standards on the federal government:

> "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" [Citations omitted] For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid . . . . 394 U.S. at 642.[13]

The uniform holdings of this Court make it clear that similar standards must be applied under the Due Process Clause to federal actions which—had such actions been practiced by the states—would be subject to close judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Thus, contrary to petitioners' unsupported inferences (Pet. Br. 52), this Court's decision in *Sugarman v. Dougall* is clearly applicable to the instant case and is not distinguishable because the Fifth Amendment guarantees against unjustifiable discrimination while the Fourteenth

[13] Similarly, in *Frontiero v. Richardson*, while only a plurality of this Court found that sex is a suspect classification, none of the eight Justices who joined the result questioned the application of identical equal protection standards to the federal government under the Fifth Amendment. 411 U.S. 677, 691 (concurring opinion of Mr. Justice Powell, in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined, and concurring opinion of Mr. Justice Stewart).

Amendment guarantees equal protection. As this Court stated last term:

> [I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.[14]

B. Since the Discrimination Suffered by Respondents is Based Solely on the "Suspect Classification" of Their Resident Alien Status, this Court Must Invoke the Closest Judicial Scrutiny to Ensure the Protection of Constitutional Rights.

In denying resident aliens the opportunity to apply for–let alone hold–virtually all jobs with the federal government, petitioners are admittedly discriminating against respondents solely because of their non-citizen status. 5 C.F.R. §338.101. Yet, it is beyond dispute today that discrimination on the basis of alienage constitutes a "suspect classification" which requires a stringent judicial standard of review.[15] This Court in *Sugarman* explicitly reiterated its 1971 holding that:

> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect

[14] *Johnson v. Robison*, ____ U.S. ____, 94 S. Ct. 1160, 1164, n.4 (1974).

[15] *E.g.*, *Sugarman v. Dougall*, *supra*, 413 U.S. at 642; *In re Griffiths*, 413 U.S. 717, 721 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420 (1948); *Oyama v. California*, 332 U.S. 633, 640 (1948).

> and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate.[16]

Since resident aliens possess the "traditional indicia of suspectness" which require the invocation of strict judicial scrutiny,[17] it is conceptually consistent that this Court has carved out special judicial protection for them. Resident aliens like respondents fall directly within the ambit of such protection because they are members of a class

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[18]

This Court's decisions of the past few years openly recognize the hostile and discriminatory treatment from which aliens historically have suffered. The holdings of *Graham*, *Sugarman*, and *Griffiths* expressly reject the notion that aliens may today be treated oppressively and differentially merely because the majority population may view them as "foreigners" to be scorned and treated as constitutional outcasts.[19] Indeed, the

[16] *Graham v. Richardson*, *supra*, 403 U.S. at 372 (1971) (footnotes and citations omitted), cited in *Sugarman v. Dougall*, *supra*, 413 U.S. at 642.

[17] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

[18] *Ibid.*; *Johnson v. Robison*, ____ U.S. ____, 94 S. Ct. 1160, 1169-70, n.14 (1974).

[19] In *Griffiths*, Mr. Justice Powell traced the rise and fall of the anti-alien doctrine which historically sustained certain legal restrictions upon aliens. *In re Griffiths*, 413 U.S. 717, 719-720 (1973); *see also Sugarman v. Dougall*, *supra*, 413 U.S. at 644-645. These decisions stand as an explicit rejection of such a doctrine.

stricter doctrinal approach invoked by this Court toward alien classifications is based on a recognition that

> [i]from its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of this country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply.[20]

Petitioners do not dispute the vast contributions made by resident aliens like respondents. Nor do they dispute that such aliens are "persons" within the

[20] *In re Griffiths*, 413 U.S. 717, 719 (1973); *see also Graham v. Richardson, supra*, 403 U.S. at 376; *Oyama v. California*, 332 U.S. 633, 646 (1948). Lower courts, such as the Court of Appeals in the instant case, have uniformly applied this new stricter standard of judicial scrutiny toward aliens. These courts have protected resident aliens from invidious legislation promulgated for no other reason than to harm or punish them as a politically unpopular group—whose very political impotence makes it virtually impossible to seek redress through normal processes. *E.g., Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir.), *cert. den.*, 409 U.S. 887 (1972); *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972); *Chapman v. Gerard*, 456 F.2d 577 (3rd Cir. 1972); *Nielsen v. Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970); *Ramos v. United States Civil Service Comm.*, 376 F. Supp. 361 (D.P.R. 1974), *appeal docketed*, No. 74-216 (U.S. Sup. Ct. 1974); *Machado v. Dept. of Health & Rehab. Serv.*, 357 F. Supp. 890 (S.D. Fla. 1973); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D. Vt. 1972); *Zarate v. Dept. of Health & Rehab. Serv.*, 347 F. Supp. 1004 (S.D. Fla. 1971); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D.Ill. 1971); *United States v. Kahn*, 336 F. Supp. 354 (E.D. Pa. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970).

meaning of the Fifth Amendment (Pet. Br. 27) and members of a "suspect" category entitled to strict judicial scrutiny (Pet. Br. 62). Yet, they appear to dispute the application of such strict judicial scrutiny to the federal government. Though never explicitly stated, they suggest that classifications based on alienage—when made by the federal government as opposed to the states—are not inherently suspect and thus not subject to the strict scrutiny of the compelling governmental interest standard (*ibid.*). Not surprisingly, such a suggestion (and its resulting repugnant double standard) is without merit either in law or in logic.[21]

[21] At one point, petitioners appear to suggest that resident aliens like respondents should not be accorded special "suspect class" treatment since their condition is temporary, not permanent.

> Unlike such characteristics as race and national origin, alienage is neither a highly visible nor an "immutable" or "unalterable" trait . . . . The condition is subject to change in most cases by action of the alien (Pet. Br. 25-26).

It is altogether obvious why petitioners never pursued this specious contention. Such a contention totally contradicts the direct holdings of this Court that *aliens*, regardless of their permanent or temporary condition, are a "suspect class" entitled to close judicial scrutiny. *E.g., Sugarman v. Dougall, supra*, 413 U.S. at 642; *Graham v. Richardson, supra*, 403 U.S. at 372. Significantly, each of the named appellees in the *Sugarman* case had lived in this country more than five years, and thus qualified for naturalization as citizens under 8 U.S.C. § 1427(a). Similarly, in *Griffiths*, this Court even observed that the appellant was "eligible for naturalization . . . [but] has not filed a declaration of intention to become a citizen of the United States . . . and has no present intention of doing so." *In re Griffiths*, 413 U.S. 717, 718, n.1 (1973). Likewise, appellee Richardson in *Graham v. Richardson* was also eligible for citizenship at the time her action

Classifications on the basis of alienage, race, or national origin are "inherently"[22]—not just sometimes—suspect. The reason they are inherently suspect goes solely to the nature of the classification, not to whether it was made by the federal government or by the states. If "[a]liens as a class are a prime example of a 'discrete and insular' minority,"[23] they are no less "discrete and insular" when the federal government makes the discriminatory classification. In essence, while the suspect classification is a constant, it is measured against a variable—the relevant compelling governmental interests. Though the federal government may have different interests than the states in a given context, it must still satisfy the demands of strict scrutiny and demonstrate that its interests compellingly

was brought. *Graham v. Richardson, supra*, 403 U.S. at 367. Yet, the fact that none of these resident aliens chose to exercise their option to become citizens did not alter this Court's findings in these three major cases that they were members of a "suspect class" who deserved close judicial scrutiny.

[22] *Graham v. Richardson, supra*, 403 U.S. at 372.

[23] *Ibid.* Significantly, this Court in *Graham* could have avoided finding alienage to be a suspect classification by basing that decision solely on Congress' regulation of immigration and naturalization. *Id.* at 376-380. By purposely reaching the constitutional discrimination issue as well, *Graham* shows that this Court wished to carve out explicit protections against disparate treatment of aliens, regardless of whether such treatment flowed from the federal government or the states. See Note, "Constitutional Protection of Aliens," 40 *Tenn. L. Rev.* 235 (1973).

justify the discrimination against aliens. *E.g., Wong v. Hampton, supra*, 500 F.2d at 1038-1039; *Jalil v. Hampton, supra*, 460 F.2d at 929. To otherwise allow Congress to

> single out aliens for discriminatory treatment forbidden to the states . . . would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states. *Ramos v. United States Civil Service Comm., supra*, 376 F.Supp. at 366.

Since the federal government is bound by the same Constitution, it does not "enjoy a license to engage in unconstitutional discrimination." This is especially so when the victims of such discrimination are resident aliens. As this Court recognized in 1970:

> [Although] the Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores . . . once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.[24]

To ensure the guarantee of those Constitutional rights, the discrimination suffered by respondents must "withstand the strict judicial scrutiny that this Court has found appropriate . . . [when] suspect classifications" are involved. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973). Such a rigorous standard requires not a detached and deferential approach toward administrative deter-

[24] *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 309, n.5 (1970), quoting from *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (concurring opinion).

minations, but an active and critical analysis. Petitioners must justify their discriminatory regulation by demonstrating that it is "necessary" to promote a "compelling government interest.[25] "Our standard of review of [laws] that treat aliens differently from citizens requires a greater degree of precision." *Sugarman v. Dougall, supra*, 413 U.S. at 642. As the following subsection will demonstrate, petitioners cannot even satisfy the more general "rational basis" standard of constitutional review,[26] let alone show such a "degree of precision."

C. No Compelling Governmental Interest Exists to Justify the Total Exclusion of Resident Aliens from Employment in the Federal Civil Service.

Since petitioners' regulation explicitly discriminates against members of a suspect class, petitioners carry the constitutional burden of demonstrating a compelling reason why resident aliens should be automatically excluded from seeking federal employment. As the Ninth Circuit below found, none of the possible "justifications" which can be conjured up to support the regulation rises to the level of legitimizing its discrimination based on alienage. *Wong v. Hampton, supra*, 500 F.2d at 1039-1040. Though petitioners have now created further possible justifications (Pet. Br. 52-58), these are equally wanting and are clearly insufficient to sanction the total exclusion of resident aliens from all federal employment.[27]

[25] *E.g., Graham v. Richardson, supra*, 403 U.S. at 372, 376; *Shapiro v. Thompson, supra*, 394 U.S. at 634, 638.

[26] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1973); *McGowan v. Maryland*, 366 U.S. 420 (1961).

[27] In their brief, petitioners contend the total exclusion of all resident aliens from federal employment opportunities can be sustained under either the "compelling interest" or "rational basis" test (Pet. Br. 52). As this Brief has shown, *supra*, at pp. 14-20, petitioners must assume the heavier "compelling interest" burden in justifying their discriminatory regulation. Yet, the denial to respondents and other resident aliens of employment opportunities within the federal government is so arbitrary and irrational that petitioners cannot even satisfy the less exacting "rational basis" standard of constitutional review.

Under this latter test, petitioners must demonstrate that their treatment of respondents "bear[s] some rational relationship to a legitimate [governmental] purpose." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). As the appellate court below suggested, none of petitioners' proferred justifications would satisfy even "this less onerous general rational relationship standard." *Wong v. Hampton, supra*, 500 F.2d at 1039, n.14. In the instant case, the legitimate governmental purpose concerns the operation of the federal civil service system, from which respondents are barred. The purpose of the civil service system–which evolved as a replacement to the "spoils" system (Pet. Br. 72-73)– is not to provide for the economic needs of citizens. Rather, the civil service system seeks to find, through objective methods, individuals with the ability and suitability to hold federal employment positions (5 U.S.C. §631) and who "will best promote the efficiency of that service." 5 U.S.C. §3301(1).

Clearly, citizenship–or lack thereof–in no way measures an individual's fitness or ability for a given position, nor offers any guide to achievement of the desired efficiency. Thus, even if petitioners' discriminatory regulation were tested by the rational basis standard, the fact of respondents' alienage clearly bears no rational relationship to the stated purposes for which the federal civil service was established.

Petitioners have offered four possible "interests" to satisfy their admittedly heavy burden of justifying a regulation which overtly discriminates against resident aliens (Pet. Br. 52-65). Petitioners themselves seem to recognize that their first two asserted "justifications" are of little weight in "dispos[ing] of any challenge to [the regulation's] constitutionality" (Pet. Br. 53). The first, that "for more than 100 years it has been the policy and practice of the federal government generally to limit or ban the employment of aliens" (Pet. Br. 52), surely does not justify a presumptively unconstitutional discrimination. As this Court has stated, "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Comm.*, 397 U.S. 664, 678 (1970). In *Walz*, the length of the "unbroken practice" was cited by this Court to demonstrate that the feared government entanglement with religion never materialized from granting tax exemptions to churches. The importance of such continuity was explained by this Court three years later:

> [H]istorical acceptance without more would not have sufficed [in Walz].... It was the reason underlying the long history of tolerance of tax exemptions for religion that proved controlling. *Committee for Public Educ. & Relig. Lib. v. Nyquist*, 413 U.S. 756 (1973).

In contrast, in this case, the evolving judicial protection accorded resident aliens has destroyed the "reason underlying the long history of [in]tolerance" toward the hiring of aliens in the federal government.

Nor is there substance to petitioners' second justification: that various other countries exclude aliens

from governmental employment (Pet. Br. 54-58). It has little bearing–let alone a substantial and compelling interest–that "exclusion of aliens from the civil service is a long-standing and widely-followed policy of other nations" (Pet. Br. 54). Such an "argument" ignores the clear pronouncements of this Court that "[o]ther nations are governed by their own constitutions, if any, and we can draw no support from theirs." *Afroyim v. Rusk*, 382 U.S. 253, 257 (1967). The issue in this case is whether petitioners' discriminatory regulation satisfies the Due Process Clause of the Fifth Amendment to the United States Constitution, not the laws of England, France, the Netherlands, Switzerland, or international law in general (Pet. Br. 55-58).[28]

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

Petitioners' third attempted justification is that the supposed "plenary federal power to regulate with respect to aliens" (Pet. Br. 58) justifies their discriminatory regulation. While respondents will deal with this inapposite argument in much detail in Part A of Section II of this Brief, *infra*, it is important here to recognize that Congressional "plenary" powers do not justify

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[28] Furthermore, if international practice served as a relevant guide in measuring the requirements of the United States Constitution, then resident aliens would be excluded from all state and municipal employment as well as from the practice of professions such as law. Yet, this Court's decisions have unequivocally ruled that states and local governments may not so discriminate against aliens in those areas. *Sugarman v. Dougall, supra; In re Griffiths, supra.*

petitioners' total exclusion of millions of resident aliens from all federal employment.[29] The existence of "plenary power to legislate with respect to immigration and naturalization" (Pet. Br. 59) cannot make constitutional what would otherwise be a violation of the Due Process Clause of the Fifth Amendment. Significantly, the exercise of this so-called plenary power has occurred in the areas of entry, deportation, and foreign relations—areas in which issues of foreign affairs, national security, and sovereignty are inevitably intertwined. *E.g., Harisiades v. Shaughnessy*, 342 U.S. 580 (1951).

The instant case, however, does not involve such paramount issues of this country's sovereignty and security. Rather, respondents seek simply the opportunity to apply to and work for the federal government in any position where their skills can be utilized. The factors which give Congress great latitude in questions of entry and deportation are simply not germane to a resident alien's employment goals or abilities.

Admittedly, as petitioners suggest, "a federal law or regulation concerning aliens may well be constitutional even though an identical state statute would be invalid" (Pet. Br. 62). Yet, the reason for this possible dichotomy stems not from the existence of plenary powers, but from the nature of the asserted compelling

[29]The appellate court below explicitly found this "plenary power" argument lacking as a possible justification for petitioners' discrimination.

> To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits. *Wong v. Hampton, supra*, 500 F.2d at 1036.

interest. In some instances, it might be possible to find that a federal law advances a compelling interest while a similar state statute promotes no compelling state interest.[30] However, in this case, the mere existence of a plenary power in areas of foreign affairs or alien entry and deportation in no way constitutes, in and of itself, the substantial and compelling federal interest necessary to justify this discriminatory regulation.[31]

[30]On the other hand, so long as they are necessary to promote a compelling governmental interest, both federal (Appendix. Pet. Br.) and state laws which classify on the basis of citizenship might survive constitutional scrutiny. *E.g., Sugarman v. Dougall*, 413 U.S. at 647-648; *Wong v. Hampton, supra*, 500 F.2d at 1041.

[31]Petitioners intimate support for their "plenary power" rationale by distinguishing *Sugarman v. Dougall*, in which this Court struck down a New York statute denying aliens the right to hold positions in that state's competitive civil service. 413 U.S. 634 (1973). Petitioners claim the vice of the New York exclusion was that it reached beyond the "narrow limits of state power to legislate with respect to aliens" (Pet. Br. 58). Such vice, they suggest, is not present in the instant case because of "the existence of comprehensive federal power to regulate with respect to aliens" (Pet. Br. 59).

Ironically, this very issue of New York's reaching beyond its "narrow limits" (Pet. Br. 58) and "legitimate state interests" (Pet. Br. 58-59) was explicitly *not* decided by this Court in *Sugarman*. This Court held that the New York statute violated constitutional guarantees of equal protection because it "denies all aliens the right to hold positions in New York's competitive civil service." 413 U.S. at 646. Since the *Sugarman* case was decided on this constitutional basis, this Court said

> we need not reach the issue whether the citizenship restriction is in conflict with Congress' comprehensive regulation of immigration and naturalization (*ibid.*).

Petitioners also make a desperate attempt to bolster their inapplicable plenary power argument by speculating about

Finally, petitioners indulge in such generalities as "sovereign nation," "undivided allegiance," and "loyalty" in attempting to meet their heavy burden of a substantial, compelling and legitimate governmental interest (Pet. Br. 63-65). They apparently feel that a citizen will be more loyal to the federal government than an alien, since the latter "in most cases still owes an affirmative duty of allegiance to a foreign nation" (Pet. Br. 64). Naturally, petitioners have offered no proof in support

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possible adverse effects on foreign relations and treaty-making (Pet. Br. 61). They suggest that opening up the federal civil service to resident aliens might

> deprive [the government] of the basis for negotiating the reciprocal termination of comparable discrimination against the employment of American citizens in the civil services of other countries (*ibid.*).

Yet, even petitioners concede that this country's treaties "typically do not expressly cover employment in the civil service of the respective contracting parties" (*ibid.*). More importantly, the very notion of using resident aliens as "pawns" to obtain benefits for American citizens residing in other countries violates the very principles of due process of law which petitioners are required to satisfy! As the American Civil Liberties Union accurately states, it "shocks the conscience" even to consider using resident aliens as "bargaining chips" for the benefit of American citizens. Brief of American Civil Liberties Union, *Amicus Curiae*, p. 18, n.3 (November 1974).

Naturally, petitioners have offered no proof in support of this contention,[32] nor any indication of how many of the nearly three million jobs in the federal government involve positions concerning "loyalty," "national security," or exercise of the national sovereignty. As the lower appellate court accurately stated:

> We have no doubt that under certain circumstances our government may, for loyalty and security reasons, properly require citizenship for certain government positions. But the Commission regulations fail to delineate any specific positions where security, loyalty, and policy-making require that the citizenship requirement be essential for employment. *Wong v. Hampton, supra*, 500 F.2d at 1040.

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[32]The absence of such proof is not surprising. Personal loyalty or allegiance is not the monopoly of citizens:

> Loyalty and the desire to work for the welfare of the [government], in short, are individual rather than group characteristics. An . . . alien may or may not be loyal; he may or may not wish to work for the success and welfare of the state or nation. But the same can be said of a . . . natural born citizen. *Oyama v. California*, 332 U.S. 633, 666 (1948) (concurring opinion).

Naturally, there are more logical–let alone effective–means of ensuring loyalty in the federal competitive service than the blanket exclusion of all non-citizens. Currently, in regard to native-born and naturalized citizens, the government conducts background investigations to the extent required by the nature of each particular job (A. 19). Each year, petitioners spend tens of millions of dollars and employ thousands of individuals to conduct such background investigations. *E.g.*, Hearings, Appropriations for 1971, Subcommittee on Independent Offices and the Department of Housing and Urban Development, Part 1, pp. 194, 269 (U.S. Civil Service Commission 1970).

Rather than delineate those special cases where "security risks" may be involved,[33] the federal

[33]Petitioners suggest that "problems of administrative convenience" justify the lack of such delineation (Pet. Br. 69).

> The problem of differentiating among jobs, among facilities, and, indeed, among different categories of aliens, is so large and intricate . . . that the courts ought not to thrust that task upon the Executive . . . (*ibid.*).

Initially, it must be emphasized that "administrative convenience" is "insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974). As this Court recently recognized:

> [A]lthough efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973) (citations omitted).

To allow "administrative convenience" to serve as a compelling government interest would completely undermine the special protection which the Constitution and this Court have carved out for resident aliens.

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very *dangerous doctrine* and if allowed to flourish would *destroy the benefit of a written Constitution* and undermine the basis of our Government. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (emphasis added).

Moreover, the argument of administrative convenience lacks factual as well as legal support. The overwhelming majority of the nearly three million positions in the federal service do not

regulation automatically excludes all aliens from the competitive civil service. Instead of identifying those positions where broad policy decisions may properly require the office-holder to be a citizen, petitioners toss a complete blanket over federal employment opportunities for aliens.[34]

The vice of such a blanket exclusion, as in the *Sugarman* case, is its overbreadth, of a regulation

involve policy-making, nor do they touch on national security. Like employees in other public and private sectors, most federal employees "work for a living in the common occupations of the community." *Truax v. Raich*, 239 U.S. 33, 41 (1915). In fact, the recent action of the United States Postal Service demonstrates the utter lack of any relationship between citizenship and the ability to perform most of the positions in federal employment. Except for certain "sensitive" positions, the Postal Service has now "adopted a policy of considering permanent resident aliens for appointment to Postal Service positions . . . on the *same basis* that it considers individuals who are U.S. citizens for appointments." United States Postal Service, Personnel Handbook, P-11, § 317.3 (emphasis added) (reported in Postal Bulletin, No. 20980, p. 2 (May 2, 1974)). This regulation also demonstrates that lines can easily be drawn to specify the particular positions for which citizenship may be required.

[34]Petitioners' argument of "security risks" and "loyalty" has a reverse twist in actual practice. While resident aliens are foreclosed from seeking all competitive civil service positions, even petitioners recognize a number of statutory exceptions to the ban on employment of aliens (Pet. Br. 84, n.72). Significantly, all employment in the Department of Defense, the Atomic Energy Commission, and the National Aeronautics and Space Administration–which all involve sensitive positions requiring the highest degree of loyalty–are fully open to aliens (*ibid.*). Similarly, even petitioners' own regulations recognize that resident aliens may be given "a limited executive assignment . . . in the absence of qualified citizens" or other "appointment[s] in rare cases." 5 C.F.R. §338.101 (b). Furthermore, positions in the highest levels of the executive branch–and

"biting off" too much of the Constitution. *E.g.*, *Sugarman v. Dougall, supra*, 413 U.S. at 642-643; *Wong v. Hampton, supra*, 500 F.2d at 1040. No effort has been made by petitioners to bar "some or all aliens from closely defined and limited classes of public employment on a uniform and consistent basis." *Sugarman v. Dougall, supra*, 413 U.S. at 639. In analogous situations, this Court has struck down discriminatory laws because "less onerous" alternatives were available to promote the governmental interest. *E.g.*, *Bullock v. Carter*, 405 U.S. 134 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963). Similarly, in the instant case, the balloon of national security and loyalty cannot possibly be inflated sufficiently to ban *all* resident aliens from *all* positions in the federal civil service.[35]

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those of a "confidential or policy determining character"–constitute an "excepted service" which is exempt from the exclusionary civil service regulation. See, *e.g.*, 5 C.F.R. §§ 213.3101 - .3394.

A similar incongruous duality confronted this Court in *Sugarman v. Dougall*, where New York's alienage exclusion did not apply to three job categories in the classified service, including the "higher offices" in the state executive department. 413 U.S. at 639. As this Court recognized, the "asserted justification proves both too much and too little." *Id.* at 642.

[35]Even under the "rational basis" test, the exclusion of all resident aliens from all federal employment would be violative of due process of law since it creates a conclusive presumption that all aliens–by virtue of that status alone–are unqualified for all federal employment. See, *e.g.*, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 411 (1973). "[Laws] creating permanent irrebutable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." *Vlandis v. Kline, supra*, 412 at 416.

Petitioners have thus failed not only to satisfy the strict requirement of demonstrating that the discrimination against respondents is necessary to promote a compelling governmental interest. They have also offered "justifications" which camouflage the real basis for exclusion. When all is said and done, petitioners advance no compelling justification because there is none. The only "justification" that exists for the total exclusion of resident aliens from the competitive federal civil service is that respondents are aliens. To state that would confess discrimination; hence, petitioners are silent.

II.

NEITHER THE "PLENARY POWER" OF THE FEDERAL GOVERNMENT NOR THE CONCEPT OF "PRIVILEGES AND IMMUNITIES" IMMUNIZES PETITIONERS FROM SATISFYING THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

As the preceding section demonstrated, it "would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (*Bolling v. Sharpe, supra*, 347 U.S. at 500) than upon the states with respect to discrimination against resident aliens in public employment. Yet, petitioners earnestly devote a substantial part of their brief to the argument that the Constitution imposes *no* duties on them in this area.

Our primary submission is that the decision to limit employment of noncitizens in the federal

> competitive civil service is . . . a matter beyond the reach of the equal protection principle [in the Due Process Clause of the Fifth Amendment] (Pet. Br. 24-25).

Essentially, petitioners suggest that the federal government is somehow exempt from the limitations of the Fifth Amendment because of "its plenary power over immigration and naturalization" (Pet. Br. 42) and because the Privileges and Immunities Clause of the Fourteenth Amendment "authorizes preferred treatment for citizens" (Pet. Br. 28). The following will demonstrate that such arguments are baseless and merely evoke now discredited judicial distinctions.

A. The Broad Federal Powers Over Immigration and Naturalization Do Not Permit Either Congress or Petitioners to Avoid the Constitutional Limitations of the Fifth Amendment.

Petitioners submit that the plenary power of Congress over immigration and naturalization, combined with the residue of powers given the President and Congress over national defense and foreign relations, remove their discriminatory regulation both from constitutional requirements and judicial review (Pet. Br. 24-25, 42-50). The power to regulate resident aliens, petitioners assert, is so absolute that the judiciary is required to acknowledge and accept all acts of Congress touching upon or affecting the lives of aliens. All such actions thus become immune from constitutional inquiry, regardless of how irrational, how invidious – or how unrelated to issues of immigration, naturalization, deportation, or national sovereignty.

The error in petitioners' reasoning is patent. The assertion that Congress has "plenary" powers over a given area does not mean that petitioners can ignore the Constitution – and judicial standards enforcing the Constitution – in implementing those powers.[36] To the contrary, Congress' power over resident aliens, like all powers in this system of government, is subject to constitutional limits which must be respected and enforced by the courts. As the lower court observed:

> To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits. *Wong v. Hampton, supra*, 500 F.2d at 1036.

While an exhaustive review of decisions is not necessary to demonstrate the validity of this statement, some examples of this Court's treatment of other plenary powers will reveal the total fallaciousness of petitioners' contention.

The plenary power relied upon by petitioners primarily stems from Article I of the Constitution, which vests in Congress the power to establish uniform rules of naturalization. U.S. Const. Art. I, Sec. 8, cl. 4. Yet, this Court's treatment of other enumerated powers in Article I destroys any claim of unfettered authority advanced by petitioners. In the area of Congress' power to conduct war and raise armies, this Court has not hesitated to strike down arbitrary classifications and

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[36] Since petitioners readily admit that an alien "is, of course, a 'person' within the meaning of the Fifth Amendment" (Pet. Br. 27), their contention that Congress' plenary power exempts them from the Fifth Amendment becomes even more difficult to fathom.

exercises of Congressional power. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[37] Instead, this Court has pierced the notion that all Congressional actions pursuant to the plenary power to conduct war and raise armies are immune from constitutional attack.

> [T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit. . . . When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our "delicate and difficult task" to determine whether the resulting restriction on freedom can be tolerated.[38]

Similarly, these same constitutional limitations constrain the President when acting under his authority as

[37] *United States v. Robel*, 389 U.S. 258, 264 (1967); *Bowles v. Willingham*, 321 U.S. 503, 521 (1944); *Home Bldg. & Loan Ass'n. v. Blaisdall*, 290 U.S. 398, 426 (1934).

[38] *United States v. Robel, supra*, 389 U.S. at 263-264. *See also, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955) (plenary powers under Article I do not "empower Congress to deprive people of trials under Bill of Rights safeguards"); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) ("the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments"); *Hamilton v. Kentucky Dist. & Warehouse Co.*, 251 U.S. 146, 155 (1919); *United States v. Russell*, 13 Wall. 623, 627 (1871); *Ex parte Milligan*, 4 Wall. 2 (1866).

In fact, this Court recently overturned Congressional legislation–stemming from the recognized federal plenary power over the armed forces–as violative of the equal protection principles in the Due Process Clause of the Fifth Amendment. *Frontiero v. Richardson*, 411 U.S. 677 (1973). See note 13, *supra*.

Commander in Chief[39] and the Congress when acting in areas of national security and foreign relations.

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal.[40]

[39] *E.g., Ex parte Quinn*, 317 U.S. 1, 25 (1942) (exercise of plenary power by the President reviewable "for conflict with the Constitution or laws of Congress constitutionally enacted").

[40] *United States v. Robel*, 389 U.S. 258, 264 (1967). *See also Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970); *United States v. Garrity*, 433 F.2d 649 (8th Cir. 1970).

Despite this unanimity of authority, petitioners nevertheless suggest still another "plenary power"–the treaty power–enables them to deprive both resident aliens and citizens alike of their constitutional rights.

> Thus, no treaty could be challenged on the ground that it discriminates against one group of foreign nationals resident here, or against citizens (Pet. Br. 24).

Once again, petitioners have misstated the law. Even the classic formulation of the treaty power announced by this Court in *Missouri v. Holland* does not sanction treaties which flout the United States Constitution. 252 U.S. 416 (1920). In that case, this Court upheld the treaty precisely because it did "not contravene any prohibitory words to be found in the Constitution." *Id.* at 434. Nearly four decades later, this Court reaffirmed its analysis in *Missouri v. Holland*, and held that an agreement with a foreign nation could not achieve what the Constitution forbids.

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights–let alone alien to our entire constitutional history and tradition–to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. *In effect, such construction would permit amendment of that document in a manner*

Nor can the Congress and the President combine their authority over national security and foreign affairs to act as they choose (Pet. Br. 46-48). Though Congress does accord the executive branch power to act,

> [t]his does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice.[41]

The strict application of constitutional guarantees is not simply limited to those plenary powers relating to war, the military, or national defense. In a host of other areas where recognized plenary powers are involved, this Court has not hesitated to ensure that constitutional guarantees be met. Whether it be Congressional legislation concerning the District of

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not sanctioned by [the Constitution]. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined .... *Reid v. Covert*, 354 U.S. 1, 17 (1957) (emphasis added).

[41] *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). See also *Afroyim v. Rusk*, where this Court denied Congress the power to frustrate the Constitution by depriving a person of his citizenship by

> simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted. 382 U.S. 253, 263 (1967).

Columbia,[42] the United States Postal Service,[43] or even

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[42] As early as 1899, this Court recognized that Congress' plenary power over the District of Columbia afforded no license to legislate for that area in a manner which ran roughshod over the Constitution. *Capitol Tractor Co. v. Hof*, 174 U.S. 1 (1899). Though Congress may surely exercise its plenary power over the District of Columbia, it may do so only "so long as it does not contravene any provision of the Constitution of the United States." *Id.* at 5 (citations omitted).

Since *Capitol Tractor*, a consistent line of cases has reaffirmed that Congress' powers over the District of Columbia are subject to constitutional limits. *E.g., Shapiro v. Thompson*, 394 U.S. 613 (1969); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hurd v. Hodge*, 334 U.S. 24 (1948); *O'Donoghue v. United States*, 289 U.S. 516, 529 (1933); *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 434-435 (1932); *see also United States v. Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972). Petitioners clearly misread the thrust of these cases when they suggest "a congressional appropriation in favor of residents of the District of Columbia ... [could not] be attacked as denying equal treatment to other citizens of the United States" (Pet. Br. 24). The reason such an appropriation might withstand judicial scrutiny has nothing to do with Congress' plenary powers over the District of Columbia. Rather, it would be upheld only so long as such law did not infringe on a recognized fundamental right, did not discriminate against a suspect class, and was premised on a rational basis.

Significantly, this Court's decision in *Bolling v. Sharpe* did not hesitate to strike down, as violative of the Fifth Amendment, discrimination practiced in the very District of Columbia over which Congress had plenary power. Moreover, as with the employment opportunities sought by resident aliens in this case, *Bolling* involved a "suspect" classification but not a substantive matter—educational opportunities—which is a "fundamental" right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-39 (1973). Nevertheless, the combination of plenary power and a non-fundamental right posed no barrier to this Court in holding the discriminatory restrictions to be unconstitutional.

[43] *E.g., Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965).

bankruptcy,[44] this Court has never permitted the invocation of a "talismanic incantation" to blur the mandate of the Constitution.[45]

It is hardly surprising that petitioners have failed to explain why the plenary power conferred by the Constitution over immigration and naturalization should be viewed any differently from other plenary powers over the armed forces, war, foreign affairs, or the like. As with these other powers, Congress is not free to ignore the Constitution. There is no dispute that Congress may deny entry to aliens as it chooses and may dictate the terms upon which an alien may become a naturalized citizen. Yet, as this Court has consistently recognized, the mere existence of these powers over immigration and naturalization does not permit Congress to deny resident aliens rights guaranteed by the Constitution.[46] Recently, this Court stated that "we

[44] *E.g., United States v. Kras*, 409 U.S. 434 (1973).

[45] Petitioner's proposition naturally leads to a series of absurd, inconsistent, and clearly unconstitutional results. For example, since Congress has complete "plenary" powers over the Armed Forces, the argument advanced by petitioners would suggest Congress could discriminate against non-whites in this area. Similarly, given Congress' complete power over federal elections and federal criminal actions, the implication of petitioners' contention is that the judiciary must ignore claims of discrimination in these vast arenas. Though respondents will not belabor the vast potential of hypotheticals, the numerous decisions of this Court clearly belie such possibilities.

[46] In carving out special judicial protection for resident aliens, this Court in *Graham v. Richardson* observed:

> Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. 403 U.S. 365, 382 (1971).

Similarly, Congress itself cannot authorize its own violation of the equal protection guarantees of the Fifth Amendment.

extend to such [lawful permanent resident] aliens *the same constitutional protection* of due process that we accord citizens." *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 309 (1970) (emphasis added). This decision reaffirmed that

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.* (Emphasis added)[47]

[47] *Hellenic Lines Limited v. Rhoditis, supra*, 398 U.S. at 309, n.5 (emphasis added), citing *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (concurring opinion). See also *Abel v. United States*, 362 U.S. 217 (1960); *Heikkinen v. United States*, 355 U.S. 273 (1958); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *United States v. Spector*, 343 U.S. 169 (1952); *Bridges v. California*, 314 U.S. 252 (1941); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Wing Wong v. United States*, 163 U.S. 228 (1886). As the late distinguished constitutional authority Alexander Bickel observed in this context:

> The original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen. Bickel, "Citizenship in the American Constitution," 15 *Ariz. L. Rev.* 369, 370 (1973).

Significantly, not only have petitioners ignored the strict application of the United States Constitution to so-called plenary powers, but they have also failed to recognize that the plenary powers doctrine does not even apply to the facts of this case. All the cases in which this Court has discussed such powers – including those cited by petitioners (Pet. Br. 42-43)[48] – dealt

[48]Petitioners place much reliance on this Court's decision in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951) (Pet. Br. 43). In that case, this Court was concerned with the deportation of a Communist who chose not to become a citizen. The context of the case was "congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States." 342 U.S. at 590. Nevertheless, this Court dealt with "the constitutional objections" under the applicable standards. *Id.* at 596. Similarly, the other cases relied on by petitioners (Pet. Br. 42-43) focused only on Congress' power to control the entry of aliens (*e.g., Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Boutilier v. Immigration Service*, 387 U.S. 118 (1967); *Chinese Exclusion Case*, 130 U.S. 581 (1889)) or to deport aliens (*e.g., Flemming v. Nestor*, 363 U.S. 603 (1960); *Galvan v. Press*, 347 U.S. 522 (1954); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

Since these cases were limited to issues of entry and deportation, none dealt with Congress' power over aliens in other contexts, especially discrimination against resident aliens in employment opportunities. The rationale for some measure of judicial deference in the areas of entry and deportation simply cannot be engrafted onto the instant case. See also Gordon & Rosenfield, *Immigration Law and Procedure*, § 1.5(a) (1974 rev. ed.) (the plenary power over immigration and naturalization "extends only to determining classes of aliens subject to exclusion and expulsion").

Finally, petitioners fail to recognize that, in the very cases cited for the proposition that Fifth Amendment restrictions do not apply to plenary powers, this Court *in fact* applied the Fifth Amendment in assessing the legality of the federal conduct. *E.g., Flemming v. Nestor, supra*, 363 U.S. at 611.

solely with matters of entry, deportation, and foreign relations. In those situations, issues of foreign affairs, national security, and sovereignty are manifestly fused.

> That aliens remain vulnerable to *expulsion* after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.[49]

As the appellate court below found, the paramount issues of this country's sovereignty and security are not present in the instant case.[50] *Wong v. Hampton, supra,*

[49]*Harisiades v. Shaughnessy*, 342 U.S. 580, 587-588 (1951) (emphasis added).

[50]Naturally, to the extent that the employment of non-citizens would involve these issues, both this Court in *Sugarman* and the appellate court below recognized that aliens might be constitutionally excluded from such positions. In *Sugarman*, this Court expressly noted that citizenship might be valid "for officers who participate directly in the formulation, execution, or review of broad public policy." *Sugarman v. Dougall, supra*, 413 U.S. at 647. Similarly, the court below equally recognized that "under certain circumstances our government may, for loyalty and security reasons, properly require citizenship for certain government positions." *Wong v. Hampton, supra*, 500 F.2d at 1040. Yet, as both decisions found, the exclusion of all resident aliens from all government positions surely does not bear on "the conduct of foreign affairs, the war power, or the maintenance of a republican form of government." *Harisiades v. Shaughnessy, supra*, 342 U.S. at 588-589. Instead, pursuant to judicial protections against overbreadth, the government must "delineate any specific positions where security, loyalty, and policy-making require that the citizenship requirements be essential for employment." *Wong v. Hampton, supra*, 500 F.2d at 1040.

500 F.2d at 1040. Rather, respondents merely seek the opportunity to apply to and work for the federal government in any position where their skills could be utilized. The factors which give Congress latitude in questions of entry and deportation[51] are simply not germane – analytically or pragmatically – to a resident alien's employment goals. Thus, Congress' exercise of "plenary powers" in areas of foreign affairs or the entry and deportation of aliens is not only tempered by constitutional requirements, but is irrelevant to the instant case.

Finally, petitioners suggest that the plenary power of Congress over immigration and naturalization gives rise to a "political" question which is effectively insulated from judicial review (Pet. Br. 48-50). They contend that federal "policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government" (Pet. Br. 48). Yet,

[51]The cautious judicial attitude toward the exercise of Congress' power to deport aliens from the United States seems further to stem from the fact that the Constitution specifically gives Congress power to establish uniform rules of naturalization (Art. I, Sec. 8), a power which inherently encompasses both immigration and deportation. *E.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889). On the other hand, there is no Constitutional recognition–let alone direction or compulsion–concerning the area of federal government employment. Moreover, such caution may also recognize that decisions relating to deportation inherently require that classifications be made among and between aliens–and often the "suspect" class of resident aliens. Naturally, there is nothing inherent in the selection of employees for the federal government which requires classifications be made between resident aliens and citizens.

in the case petitioners cite for this proposition (*Galvan v. Press*), this Court in the very next sentence following petitioners' quotation said:

> In the enforcement of these policies, the Executive Branch of the Government must respect the . . . safeguards of due process. 347 U.S. 522, 531 (1974).[52]

Clearly, this Court no longer tolerates the possible spectre of "political" issues as an automatic immunization from judicial interference. Simply because any policy toward aliens may tangentially relate to, or affect, political questions inherent in foreign relations is not reason enough to preclude judicial review of such a totally exclusionary rule. Under the political question doctrine formulated by this Court, it is the "responsibility of this Court as ultimate interpreter of the Constitution" to decide issues of justiciability. *Baker v. Carr*, 369 U.S. 186, 211 (1962). As this Court stated in that case,

> it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. *Ibid.*

Similarly, given this Court's stringent protective review in the past (*supra* at pp. 14-20) and its special solicitude for

[52]The *Galvan* case, as did the others cited by petitioners (Pet. Br. 48-49), involved the applicability of due process to deportation proceedings. As respondents recognize, this Court has been reluctant to impose limitations on the substantive grounds for which an alien can be deported (*supra* at pp. 38, 40). Yet, once an alien has been admitted to this country for permanent residence, and so long as he has not been deported, he is entitled to "the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen." *Galvan v. Press, supra*, 347 U.S. at 530.

the rights of resident aliens, it would be both erroneous and incongruous to remove petitioners' discriminatory conduct from the protective scope of the Fifth Amendment.

In essence, petitioners have confused "plenary" power with absolute and unrestricted power, positing a premise which is both judicially unsupportable and operatively pernicious. Just as "[t]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power,"[53] nor can the "talismanic incantation" of "political question" operate to preclude judicial protection of constitutional rights.[54] Nor can the phrase "plenary power over immigration and naturalization" (Pet. Br. 42) render constitutional the discrimination practiced by the federal government against resident aliens.

> With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government, vis-a-vis citizens of this country. *Wong v. Hampton, supra,* 500 F.2d at 1036, n.10a.

As the appellate court found – and as this Brief has shown – petitioners have grossly exceeded those constitutional limitations.

[53] *United States v. Robel*, 389 U.S. 258, 263 (1967).

[54] See *e.g., Powell v. McCormack*, 395 U.S. 486 (1969).

B. Since Employment in the Federal Civil Service Is Not a "Privilege" of National Citizenship, the Privileges and Immunities Clause Cannot Justify the Total Exclusion of Resident Aliens from All Government Employment.

Petitioners offer one more detour to avoid the clear path of protection guaranteed by the Due Process Clause of the Fifth Amendment. They contend that employment in the federal civil service is a "privilege of national citizenship" which can be denied to resident aliens without any regard to the requirements of the Fifth Amendment (Pet. Br. 28-42). In support of this rather novel argument, petitioners employ a sophistic line of reasoning and a careless disregard of history. Their argument, however, not only misconstrues the purposes of the Privileges and Immunities Clause, but amounts merely to "old wine in new bottles." As this subsection of respondents' Brief will show, such an argument is simply the invocation of the now discredited "right-privilege" dichotomy which this Court has openly "rejected"[55] in measuring the scope of protected constitutional rights.

The Privileges and Immunities Clause in the Fourteenth Amendment was adopted to prohibit the states from denying individuals of African descent the privileges and immunities of national citizenship. Over the years, the clause has been consistently interpreted as an explicit constitutional recognition of the federal-

[55] *E.g., Sugarman v. Dougall, supra*, 413 U.S. at 644; *Graham v. Richardson, supra*, 403 U.S. at 374; *Shapiro v. Thompson*, 394 U.S. 618, 627, n.6 (1969).

ism concept on which this system of government is based. Yet, the clause did not "radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people." *McPherson v. Blacker*, 146 U.S. 1, 39 (1892). Instead, it simply recognized

> [t]here is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.[56]

As both the language of the clause and the interpretations of this Court demonstrate, nothing in the Privileges and Immunities Clause extended the authority of the federal government. The clause was adopted to restrict state discrimination, not to authorize federal discrimination. Nothing in the clause exempts the federal government from the strictures of the Fifth Amendment nor authorizes it to deny resident aliens rights accorded by that amendment.

> [T]he privileges and immunities of a citizen of a state . . . were not intended to have any additional protection [by the clause]. . . . They must rest for their security and protection where they have heretofore rested.[57]

[56] *Slaughter-House Cases*, 16 Wall. 36, 74 (1873); *McPherson v. Blacker, supra.*

[57] *Maxwell v. Dow*, 176 U.S. 581, 587-588 (1900). *See also Madden v. Kentucky*, 309 U.S. 83 (1940); *Twining v. New Jersey*, 211 U.S. 78 (1908); *McPherson v. Blacker, supra; In re Kemmler*, 136 U.S. 436 (1890); *United States v. Cruikshank*, 94 U.S. 542, 549 (1875). As this Court has uniformly held, "protection to life, liberty, and property rests primarily with the states" (*In re Kemmler, supra*, 136 U.S. at 448), as do "those fundamental civil rights for the security and establishment of which organized society was instituted" (*McPherson v. Blacker, supra*, 146 U.S. at 37).

It is thus firmly established that the Privileges and Immunities Clause could not – and did not – "attempt to confer any new privileges or immunities upon citizens." *Twining v. New Jersey, supra*, 211 U.S. at 95.[58] Contrary to petitioners' assertion, the clause gave no power to Congress to create or isolate rights appertaining to national citizenship for the express purpose of denying those rights, by legislation or otherwise, to non-citizens. Rather, the clause was no more than an explicit constitutional recognition of a power that Congress already and always possessed:

> [I]t was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied, no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and laws of the United States always controlled any state legislation of that character. *Twining v. New Jersey, supra*, 211 U.S. at 95.

With judicial expansion of the due process and equal protection components of the Fourteenth Amendment, the Privileges and Immunities Clause has become virtually a dead letter in the Constitution.[59] This Court

[58] *See also, e.g., Hague v. C.I.O.*, 307 U.S. 496, 512 (1939); *Minor v. Happersett*, 21 Wall. 162 (1874).

[59] As one commentator observed:

> Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a "practical nullity" by a single decision of the Supreme Court [*Slaughter-House Cases*] rendered within five years after its ratification. 1 Schwartz, *Statutory History of the United States*, 334 (1970).

has not employed the clause as a means to invalidate state laws.[60] Nor has it expanded the narrow list of "privileges and immunities of citizens of the United States." Indeed, this Court has held that most of our basic rights and liberties fall outside the scope of the clause.[61]

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[60]Even this Court's decision in *Colgate v. Harvey*, 296 U.S. 404 (1935), was explicitly overruled in *Madden v. Kentucky*, *supra*.

[61]In fact, this Court has held that the entire Bill of Rights falls outside the scope of the clause. *Twining v. New Jersey*, *supra*; *Madden v. Kentucky*, *supra*. Thus, among those cherished rights not covered by the Privileges and Immunities Clause are First Amendment protections of free speech and assembly (*Hague v. C.I.O.*, *supra*), Fifth Amendment self-incrimination protections (*Twining v. New Jersey*, *supra*), Fifth Amendment double jeopardy protections (*Palko v. Connecticut*, 302 U.S. 319 (1937)), Sixth Amendment jury trial protections (*Walker v. Sauvinet*, 92 U.S. 90 (1875)), and Eighth Amendment protections against cruel and unusual punishment (*In re Kemmler*, 136 U.S. 436 (1890)).

As far as employment-related rights are concerned, this Court recently stated that "the right to practice law is not a 'privilege or immunity' within the meaning of the Fourteenth Amendment." *In re Griffiths*, 413 U.S. 717, 719, n.4 (1973). This statement reaffirms that the Privileges and Immunities Clause provides no protection for the right to engage in business in general (*Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907); *Holden v. Hardy*, 169 U.S. 366 (1898)), to engage in any of the state-regulated occupations (*Crowley v. Christiansen*, 137 U.S. 86 (1890); *Bradwell v. Illinois*, 83 U.S. 130 (1872)), nor even to acquire, own, or receive income from out-of-state investments (*Madden v. Kentucky*, *supra*).

As for those personal entitlements found to be within the Privileges and Immunities Clause,[62] they are essentially protective of the political and individual rights of previously oppressed individuals. Most relate to a young nation's attempt to establish and preserve its

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[62]Petitioners offer a "comprehensive list" of such privileges and immunities at pp. 37-38, n.26 of their brief. Significantly, their "list" derives from a 1904 lower federal court decision which *rejected* the contention that the right to unionize was a privilege and immunity of citizenship. *United States v. Moore*, 129 Fed. 630 (C.C.N.D. Ala. 1904). The passage from *Moore* which petitioners quote was written "to show how entirely different [privileges and immunities] are in origin and nature from rights involved in this case." *Id* at 633. Moreover, contrary to petitioners' intimation (Pet. Br. 37, n.26), the *Moore* case was subsequently cited in *United States v. Guest*, 383 U.S. 745, 759 (1966), for the proposition that the right to interstate travel is a federal right protected by 18 U.S.C. § 241, not the Privileges and Immunities Clause.

In any event, substantial doubt exists today whether the Privileges and Immunities Clause secures many of these entitlements. For example, though the privilege of the writ of habeas corpus is listed as a privilege and immunity of national citizenship (Pet. Br. 37, n.26), it is today guaranteed by the Constitution without regard to citizenship. Similarly, while the rights to free expression, peaceful assembly, and interstate travel are also listed as privileges and immunities of citizenship, the decisions of this Court have made clear they are rights common to all persons. See note 61, *supra*. Indeed, this Court has directly recognized that rights enjoyed by all persons are, *ipso facto*, not privileges or immunities of national citizenship. Such rights

> are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the federal government whether citizen or not. *Maxwell v. Dow*, *supra*, 176 U.S. at 595-596.

national sovereignty. The right to travel between the states was necessary to avoid Balkanization and the break up of this nation into separate enclaves. Protection for those who asserted federal rights was aimed at preserving loyalties of citizens to the federal as well as state governments. The interests protected were basically civil rights that related directly to issues of national sovereignty.

Clearly, the "right" to federal employment is totally lacking in those political and national sovereignty characteristics which are common to the few interests deemed to be privileges and immunities of national citizenship.[63] More importantly, while the Privileges and Immunities Clause does secure certain rights, it does not sanction the Congress to declare that federal employment is among those rights. Even petitioners admit "that no branch of government can expand or contract the substantive content of the Privileges and Immunities Clause" (Pet. Br. 39). Yet, they ignore their own admission by suggesting that – simply because the Congress has restricted federal employment to citizens – federal employment is thus a privilege and immunity of citizenship. The circularity of such reasoning is astounding. No matter how ancient a Congressional policy may be, it cannot be automatically transformed

[63]Since the Privileges and Immunities Clause is concerned with state infringement on those interests necessarily relating to national citizenship, it is even further evident that federal employment is not such a right. Not even petitioners suggest there is any possibility that states may threaten to infringe upon any individual's application for federal employment. The absence of such danger not only obviates any need for Congress to protect individuals from state action, but removes federal employment from the essential purpose underlying the clause.

into a constitutional right. If the denial of federal employment to respondents offends the Due Process Clause of the Fifth Amendment, no amount of Congressional sanction can remove the infirmity.[64]

Finally, even if, *arguendo*, federal employment were covered within the Privileges and Immunities Clause, it

[64]Petitioners employ a novel bootstrap argument in attempting to elevate federal employment to the level of a privilege and immunity. They argue that since "the right to elect federal officers is deemed a privilege of national citizenship . . . [*a*] *fortiori* . . . the more direct participation in government [through federal employment] ought to be so characterized" (Pet. Br. 38). Such a leap in logic is by no means clear. But, even if the one followed logically from the other, the initial premise–that the right to vote for federal officials is a privilege and immunity of citizenship–contravenes explicit decisions of this Court. As early as 1874, this Court held that the right to vote was not a privilege and immunity guaranteed against state infringement. *Minor v. Happersett*, 21 Wall. 162 (1874). Naturally, though "the right of suffrage is not a necessary attribute of citizenship" (*United States v. Cruikshank, supra*, 92 U.S. at 555-556), there is no dispute today that the right to vote is constitutionally based and, as such, can be protected through Congressional legislation. But it is a right secured by the Constitution, not by the privileges and immunities of citizenship. *E.g., Smith v. Allright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

Finally, petitioners suggest Congressional legislation in the 1860s and 1870s demonstrates that the Privileges and Immunities Clause applies to federal employment (Pet. Br. 30-33). Yet, this legislation reflected a use of the clause which this Court has consistently rejected during the past 100 years (*supra* at pp. 46-50). Such legislation was also adopted at a time when the constitutional guarantees of due process and equal protection were accorded a relatively narrow scope. *E.g., Civil Rights Cases*, 109 U.S. 3 (1883). Since the range of constitutional protections has grown dramatically during the past century, it is indeed anomalous to justify present constitutional violations by utilizing historically abandoned standards.

could still not be denied to non-citizens under the clause. The purpose of the Privileges and Immunities Clause was to guarantee, not deny, rights. As petitioners readily concede, the framers of the clause never even thought about – let alone dealt with – resident aliens (Pet. Br. 30). Instead, they were solely concerned with establishing civil rights for a class of previously oppressed individuals. Until now, no one has ever suggested that the interests guaranteed by the clause were not universally shared by all individuals. It is hardly surprising that none of the myriad cases cited by petitioners (Pet. Br. 28-42) reflects any intent – explicit or otherwise – to deny aliens the protection of those rights.

Petitioners' contention stems from a method of interpretation which belies historical as well as logical foundation. Since the Privileges and Immunities Clause is silent as to non-citizens, petitioners infer that the interests guaranteed by the clause must not extend to such non-citizens. Yet, as petitioners readily admit, the constitutional protections now accorded aliens did not exist at the time of the clause's passage. Similarly, equal protection constraints on the federal government had not been fully developed at that time. Thus, the fact that "[i]t never occurred to these contemporaries of the Fourteenth Amendment" (Pet. Br. 30) to include aliens demonstrates not conscious exclusion of non-citizens, but merely conscious concern for citizens. What petitoners have done it to mix the different standards of two distinct centuries to reach an unwarranted and unjustifiable conclusion.

In attempting to resurrect the Privileges and Immunities Clause as a limitation on resident aliens,

petitioners are really seeking to have "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." *Sugarman v. Dougall, supra*, 413 U.S. at 644; *Graham v. Richardson, supra*, 403 U.S. at 374. Fortunately, this Court no longer tolerates such ancient and unwarranted distinctions. Similarly, the tortured history and limited application of the Privileges and Immunities Clause teach that its provisions will no longer shield the individual from any but the most narrowly defined actions of the states. For petitoners to now use the clause as a means of shielding their own actions from the requirements of the Fifth Amendment twists the clause from its constitutional moorings and totally distorts its narrow purpose. Both history and a uniform line of cases in this Court require the strongest rejection of petitioners' highly unorthodox use of this clause.

III.

PETITIONERS' REGULATION WHICH EXCLUDES NON-CITIZENS FROM ANY FEDERAL EMPLOYMENT IS UNAUTHORIZED BY EITHER CONGRESS OR THE PRESIDENT, AND CONTRAVENES TWO EXECUTIVE ORDERS.

As Section I of this Brief has clearly demonstrated (*supra*), the federal regulation excluding all resident aliens from employment opportunities in the federal civil service system violates the Fifth Amendment to the United States Constitution. Yet, this regulation also suffers fatally from patent non-constitutional defects.

While petitioners have been given discretion to issue regulations establishing standards for admission into the civil service, their discretion must be exercised in accordance with – and cannot exceed or conflict with – the authority granted to them by either the Congress or the President. As this section of respondents' Brief will show, there is no explicit Congressional or Presidential authorization which sanctions petitioners' blanket discrimination against the employment of permanent resident aliens in the federal government; to the contrary, two executive orders directly forbid such discrimination. The absence of such explicit authorization and the contravention of two Presidential mandates constitute further reasons why the discriminatory civil service commission regulation, 5 C.F.R. §338.101, must be rendered invalid.

A. Neither Congress nor the President Has Authorized the Civil Service Commission Automatically to Foreclose Resident Aliens From the Federal Competitive Civil Service.

1. Explicit Authorization Must Be Found When Administrative Actions Affect Important Individual Rights.

An administrative agency receives only as much authority as is properly delegated to it. From this maxim flows the well-established rule that an administrative agency may never exceed, alter, or conflict with the laws from which its powers stem. *E.g., Vitarelli v. Seaton*, 359 U.S. 535 (1959); 3 Davis, *Administrative Law Treatise*, §§27.01, *et seq.* (1970). As applied to the instant matter, this rule requires that the United

States Civil Service Commission not exercise authority which has not been granted to it by either the United States Congress or the President of the United States.

In determining whether administrative agencies act within the ambit of their authority, courts generally accord these agencies a presumption of regularity. Yet such a deferential judicial attitude toward administrative interpretation does not apply when the actions of these agencies affect important and sensitive individual rights. Rather than to presume any regularity in such cases, this Court has been most zealous to guarantee against possible governmental incursion on those rights. *E.g., Peters v. Hobby*, 349 U.S. 331, 345 (1954); *Ex parte Endo*, 323 U.S. 283, 299-300 (1944). Thus, when the practices of a federal agency appear to conflict with constitutional rights, this Court does not presume the validity of such actions; instead, it presumes that either Congress or the President intended to protect those rights.[65]

The discrimination suffered by respondents – their total exclusion from federal employment opportunities – not only affects the rights of millions of resident aliens for whom this Court has carved out "suspect" class treatment. It also involves an employment interest which this Court has called "the very essence of . . . personal freedom." *Traux v. Raich*, 239 U.S. 33, 41 (1915). Given the importance of the rights and interests involved in this case, basic concepts of administrative and interpretative law require that petitioners demonstrate *explicit* authority for their discriminatory regulation.

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[65] See, *e.g., Cole v. Young*, 351 U.S. 536, 556 (1956); *United States v. Rumely*, 345 U.S. 41, 44-45 (1952); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-53 (1950).

The need for such explicit authorization was itself explicitly recognized by this Court in *Greene v. McElroy*, 360 U.S. 474 (1959). There, the Secretary of Defense revoked Greene's security clearance pursuant to rules which denied him basic procedural protections. The Secretary of Defense contended that an executive order gave him general authority to set conditions for the dissemination of classified information, and that Congress had ratified such action by the appropriation of funds. *Id.* at 506. Writing for this Court, Mr. Chief Justice Warren said such general authorization might be sufficient where there were no sensitive issues of individual rights involved. But, where "substantial restraints on employment opportunities of numerous persons" are imposed which raise issues of constitutional dimension, this Court held that "explicit" authorization was necessary. *Id.* at 506-507.

As the *Greene* decision emphasizes, administrative agencies are not endowed with the authority to make decisions of constitutional import. *Ibid.* Explicit Congressional or executive authorization must be present both to assure that individuals are not inadvertently deprived of cherished rights and to assure that law-makers engaged in careful and purposeful consideration. Such decisions of highest import should not "be assumed by acquiesence or non-action." *Id.* at 507.

The requirement of "explicit authorization" when important rights are at stake evinces a strong judicial policy which has been consistently reaffirmed by this Court.

> [W]hen action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not 'the President or Congress, within their respective constitutional powers, *specifically* has decided that the imposed procedures are necessary and warranted and has authorized their use.' *Hannah v. Larche*, 363 U.S. 420, 430 (1960) (emphasis added).

The following two parts of this Brief disclose the total lack of any specific or explicit authorization for petitioners' promulgation of the discriminatory federal regulation, 5 C.F.R. §338.101.

2. Congress Has Never Explicitly Authorized the President or Petitioners to Deny Federal Employment to Non-Citizens.

To satisfy the explicit authorization standard, this Court has suggested that an administrative agency must demonstrate the enactment of "specific legislation" by Congress on the subject at hand. *Greene v. McElroy*, *supra*, 360 U.S. at 507. It follows, then, that since the Civil Service Act of 1883 and its subsequent amendments[66] are totally silent on the subject of citizenship, no derogation by them of respondents' important individual rights can be assumed.[67] Yet, respondents are aware that inquiry into both the legislative scheme and history is proper to ascertain whether Congress has

[66]Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. §§3301, *et seq.*

[67]In the face of a totally "silent" statute or regulation, none of the cases since *Greene* has found the requisite authorization. In *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), this Court recognized the need for explicit authorization (at 890), but found such in a presidentially approved regulation along with "the benefit of an illuminating gloss of history." *Id.* at 892.

authorized a derogation not explicitly stated. *E.g.*, *Hannah v. Larche, supra*, 363 U.S. at 431. Such an examination in the instant case reveals neither direct nor even indirect evidence that resident aliens were to be excluded from the federal service.

Preliminarily, it must be recognized that the plain and clear language of the Civil Service Act (5 U.S.C. §3301) indicates no intention to grant the President – much less petitioners – authority to promulgate orders or regulations with regard to citizenship. In fact, the language of the Act does not even mention citizenship at all. On the other hand, it is most specific about a myriad of other employment criteria. Section 3301(2) of the Act, for example, authorizes the President to ascertain the applicants' fitness as to "age, health, character, knowledge, and ability for the employment sought." This specificity[68] with regard to the five established criteria[69] for fitness can only mean that other particular criteria were not intended by Congress. Such an interpretation – and resulting lack of

[68]It is an established rule of statutory construction that the enumeration of specific items in a statute implies exclusion of omitted items (*expressio unius est exclusio alterius*). *E.g.*, *Addison v. Holly*, 322 U.S. 607 (1944); *Case v. Kelly*, 133 U.S. 21 (1890); see also 2a Sands, *Statutes and Statutory Construction*, §47.23 (4th ed.) (1944).

[69]Although the five criteria did not appear in the 1883 Pendleton Bill as either introduced or passed by Congress, the Congress was aware of existing law setting forth the five criteria and did not wish to "repeal" or "in anywise affect" that provision. See Appendix to S.Rep. No. 576, 47th Cong., 1st Sess., p.23 (commentary by Dorman B. Eaton) (1883). See also R.S. §1753, predecessor statute to 5 U.S.C. §3301.

authorization to exclude aliens – is bolstered by Congress' mandate that the President "best promote the efficiency of [the civil] service." 5 U.S.C. §3301(1). Clearly, this Congressional concern with efficiency would best be served by the largest pool of potential employment candidates, regardless of citizen status. Neither Congressional actions nor logic permits the assumption that resident aliens would not be as good as, and often better than, citizens at performing most functions within the federal civil service system.

A review of the original civil service law passed in 1883 also demonstrates that Congressional silence as to citizenship occurred amidst much particularity and specificity in regard to the most detailed aspects of federal employment. The 1883 Pendleton Act set the salaries of the civil service commissioner, as well as the salaries of the chief examiner, the commission secretary, and the commission messenger.[70] Provision for stationery and office supplies was made by the Act;[71] and both habitual intoxication[72] and nepotism[73] were made specific grounds for exclusion from the federal service. Again, this meticulous attention to detail clearly shows that a requirement of citizenship was not overlooked or merely assumed by the Congress.

[70]14 Cong. Rec. 861, §§1, 3 (S. 133) (1883).

[71]*Id.* at §4.

[72]*Id.* at §8.

[73]*Id.* at §9.

Petitioners suggest that Congressional committee reports[74] and floor debates[75] containing references to

[74]Petitioner's quotation from the Senate Committee Report on the Pendleton Bill (Pet. Br. 77) must be placed in context. The drafter of the Pendleton Bill, Dorman B. Eaton, was heavily influenced by the British civil service system. Kaplan, *The Law of Civil Service* 1 (1958); D. Eaton, *Civil Service in Great Britain* (Harper 1880) (first issued in 1879 as *Report Concerning Civil Service in Great Britain*, 46th Cong., 2d Sess., House Ex. Doc. 1, pt. 7). The British system, at one point, had found it expedient to remove the right to vote and the right to run for elective office from civil servants as a partial check on their abuse of power. See D. Eaton, *Civil Service in Great Britain, supra*, pp. 71-72, 131-132, 146. It was therefore important for the Senate Committee to stress that civil servants under the Pendleton Bill would not "lose any of their rights or avoid any of the responsibilities of citizenship." S. Rep. No. 576, 47th Cong., 1st Sess., p. XII. Thus, it is an unwarranted embellishment to read this quotation as evidence of a Committee "expectation" that all civil servants need be citizens (Pet. Br. 77).

It is likewise unwarranted for petitioners to imply (Pet. Br. 73-75) that the Civil Service Law passed in 1871 intended to exclude resident aliens from federal employment. Act of March 3, 1871, c.114, §9, 16 Stat. 514. Not only was that Act silent in regard to citizenship, but the very same 41st Congress which adopted the Civil Service Law had, only one year earlier, passed the Enforcement Act of 1870. That act, as petitioners readily concede (Pet. Br. 30-32, nn. 18-20), explicitly barred discrimination against non-citizens on grounds of their alienage with regard to the making and enforcing of contracts. Enforcement Act of 1870, 16 Stat. 144, now codified in 42 U.S.C. § 1981, 18 U.S.C. § 242. In fact, Section 17 of that Act made it a criminal offense for a person under color of law, statute or regulation to deprive an alien of the rights guaranteed in Section 16 of the Act. Consequently, it is highly implausible that the Congress which enacted legislation expressing such concern for the rights of aliens would have, in the very next year, *silently* authorized the President or Civil Service Commission to discriminate against aliens in federal employment.

[75]Petitioners' reference to legislative history below the level of official committee reports is of questionable validity. See Mr. Justice Jackson's comments in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395 (1951); *see also*, Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says", 34 *A.B.A.J.* 535, 537-538 (1948).

the word "citizen" indicate that some legislators had the "expectation" that all civil service personnel would be citizens (Pet. Br. 77-78). Naturally, individual "expectations" do not amount to Congressional authorization. Moreover, the weight accorded such expectations must be seriously questioned, since the drafters of the Pendleton Act consistently used the term "individual" throughout the entire legislation.[76] Nowhere does the word "citizen" even appear in the Act.[77]

It is further significant that while the Congress has had repeated opportunities to express its intentions regarding alienage, it has chosen not to do so. For example, as petitioners stress (Pet. Br. 76-77), the Pendleton Bill (S. 133) was originally prefaced by a preamble containing a reference to "citizens." S. Rep. No. 576, 47th Cong., 1st Sess., p. XII (1883). This preamble was rejected by the Senate (14 Cong. Rec.

[76]The current codification of the Civil Service Act, 5 U.S.C. §§3301, 3303, also continues to use the term "individual."

[77]The legislative history in 1883 even suggests that the term "citizen" was used by some legislators to refer to residency in a particular state, territory or the District of Columbia, not as a condition of national allegiance. 14 Cong. Rec. 566 (1883) (proposed amendment offered by Senator Pugh). The use of the word "citizen" in such a speaking parlance is recognized by Webster's Seventh New Collegiate Dictionary 151 (1971 ed.), whose primary definition of "citizen" is "an inhabitant of a city or town."

661), thus leaving the Act without any reference to citizenship or alienage. Even petitioners admit (Pet. Br. 78, n. 62) that a companion bill to S. 133 – S. 939, which contained an explicit requirement of citizenship – was rejected by the Senate Committee on Civil Service and Retrenchment and not reported out. This bill, introduced by Senator Dawes, would have made appointments open to citizens only and required vacancies to be filled by citizens as well. Appendix to S. Rep. No. 576, *supra*, at 4 (1883). As this Court has recognized, rejection of such a specific bill on the particular issue at hand reinforces the total absence of any explicit authorization. *E.g., Hannah v. Larche, supra*, 363 U.S. at 431.

In *Hannah*, this Court examined the legislative history in order to find explicit authorization. *Ibid.* In the course of this examination, this Court found it dispositive – as to the issue of authorization – that Congress chose one bill over another. Since Congress enacted the bill with the lesser procedural restrictions, this Court found that Congress consciously authorized, in a sufficiently explicit manner, a cutback on procedural safeguards.

> We have no doubt that Congress' consideration and rejection of the procedures here at issue constituted an authorization. . . . *Id.* at 439.[78]

[78]The "rejection" mentioned by this Court was the failure to report Senator Dirksen's bill (S. 83) out of the Committee on the Judiciary, to which it was sent after introduction to the Senate. 102 Cong. Rec. 250 (1957). The bill never made it out of Committee (Index, Pt. 13, 103 Cong. Rec. 857), and the alternate bill (H.R. 6127) was passed by both Houses of Congress and signed into law. Index, Pt. 13, 103 Cong. Rec. 1084. Similarly, the Dawes bill (S. 939) offered in 1883 was also sent to committee from which it never emerged. Index, 13 Cong. Rec. 493, 47th Congress, 1st Sess. (1883).

Applying the *Hannah* test to the case at bar uncontrovertably demonstrates that Congress did not authorize either the President or the Civil Service Commission to make citizenship a criterion of federal employment. To the contrary, by explicitly rejecting the Dawes bill which contained a citizenship requirement and by passing the Pendleton Bill which was silent on citizenship,[79] Congress must be deemed to have rejected a citizenship criterion.

Petitioners also suggest that subsequent acquiescence and/or ratification of their regulation by the Congress or the President constitute the requisite authorization. In particular, they point to appropriation acts which have denied salaries to non-citizens as an indication of Congressional ratification of the exclusionary regulation (Pet. Br. 83-85). This same argument of subsequent acquiescence or approval was made and rejected by this Court in *Greene*:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. *Greene v. McElroy, supra*, 360 U.S. at 506.[80]

Yet, this Court in *Greene* ruled that Congressional inaction was not sufficient to show such explicit authorization. Likewise, the mere passage of appro-

[79]Except in the preamble, which was rejected by the Senate, 14 Cong. Rec. 661 (*supra* at pp. 61-62).

[80]See also *Hannah v. Larche, supra*, 363 U.S. at 438.

priations for the civil service does not rise to the level of explicit authorization.[81]

Finally, petitioners contend that the Civil Service Commission itself, through its internal procedures and rule making, further legitimatizes the exclusionary policy (Pet. Br. 79-80). Such a contention is no more than a classic "bootstrap" argument. Under this type of reasoning, any agency – through a flurry of promulgated regulations and reports – could ensure sanction for any action or policy not specifically authorized in enabling legislation or executive orders. The particular language and general policies which underlie this Court's decision in such cases as *Greene* and *Hannah* will clearly not tolerate such "proof" of authorization.

3. The President Has Never Explicitly Authorized Petitioners to Deny Federal Employment to Non-Citizens.

As there is no Congressional authorization, neither is there any Presidential authorization for petitioners' discriminatory regulation. The regulation purportedly was issued to implement Executive Order No. 10577 (promulgated by President Eisenhower on November 22, 1954, 19 Fed. Reg. 7521), which itself was issued under the authority of the Civil Service Act. See *Wong v. Hampton, supra*, 500 F.2d at 1034. As the Act did

[81] Even the lower appellate and district courts in this case found that "[t]he appropriations acts are not the basis for the regulations." *Wong v. Hampton*, 500 F.2d at 1034. These courts implicitly recognized that petitioners' argument concerning subsequent ratification also proves too much. If Congress felt that the Civil Service Act excluded aliens from federal employment, there would have been no need to include limitations on aliens in the appropriations legislation.

not discriminate against resident aliens, neither could the Executive Order, whose scope was delimited by the authorizing statute (see subsection III(A)(2), *supra*). Moreover, this Executive Order states in pertinent part:

> The Commission is authorized to *establish standards* with respect to citizenship . . . which applicants must meet to be admitted to or rated in examinations. Executive Order No. 10577, § 2.1(a) (emphasis added).

The language of this order on its face shows that President Eisenhower directed the Commission to select certain employment positions to be reserved for citizens only (positions requiring the highest loyalty and security) and to establish standards between those security jobs and other positions. See *Wong v. Hampton, supra*, 500 F.2d at 1040 (constitutionally permissible distinctions between aliens and citizens in security positions). The phrase "establish standards" in no way contemplates a complete exclusion of non-citizens, but explicitly mandates that standards and distinctions based on citizenship be drawn. Petitioners' response to this order – issuance of the totally exclusionary regulation – grossly exceeds both the language and intent of the Presidential order.[82]

In fact, given the significant developments concerning the rights of aliens during the first half of this century, President Eisenhower's order obviously was intended to loosen the constraints imposed by the previous exclusionary rules promulgated under Presidents Arthur[83] and Theodore Roosevelt.[84] Beginning with

[82] See Subsection B of Section III of this Brief, *infra*.

[83] Rule XI, First Report of the United States Civil Service Commission 47 (1884).

[84] Rule V, Twentieth Report of the United States Civil Service Commission 48 (1904).

Yick Wo v. Hopkins, 118 U.S. 356 (1886), this Court in the succeeding decades opened up a significant number of rights for non-citizens. Aliens were granted the right to work for a living in the common occupations of the land,[85] to acquire state resources,[86] to own land,[87] and to reasonable compensation for property taken by the state.[88] All of these decisions expanding the rights of aliens took place *after* the passage of the 1883 Civil Service Act and *before* issuance of the 1954 Executive Order. This historical context further demonstrates why the order required reasonable distinctions to be made between citizens and non-citizens, not the outright exclusion of non-citizens.

Finally, since no history exists to explain the phrase "establish standards" in Executive Order No. 10577, it must be given its natural and plain meaning. Under such interpretation, there can be no doubt that this language does not permit – let alone require – the exclusion of non-citizens from the federal civil service. Nor does the language offer any support to petitioners in meeting their burden of demonstrating explicit authorization.[89] Lacking either the explicit authority of Congressional legislation or an executive order, the discriminatory regulation must thus be deemed an illegal barrier to

[85] *Truax v. Raich*, 239 U.S. 33 (1915).

[86] *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948).

[87] *Oyama v. California*, 332 U.S. 633 (1948).

[88] *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

[89] *Greene v. McElroy*, *supra*, 360 U.S. at 507; *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 846 (D.C. Cir. 1970).

respondents' rights to employment opportunities in the federal government.

B. Petitioners' Exclusionary Regulation Contravenes Executive Orders Nos. 10577 and 11478.

Just as administrative regulations must be authorized by the legislature or the executive, it is likewise axiomatic that such regulations may not conflict with the express provisions of any superior order.[90] In the instant case, this axiom requires that the Civil Service Commission – as an agency within the executive branch of government – not violate express orders promulgated by the executive. Yet, petitioners' discriminatory regulation which bars resident aliens from federal employment squarely contravenes both Executive Order No. 10577[91] and Executive Order No. 11478.[92]

In Executive Order No. 10577, President Eisenhower ordered that:

> . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted [to the Service]. . . . *Id.* at § 2.1(a).

[90] *E.g.*, *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Jalil v. Hampton*, 460 F.2d 923, 927 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972).

[91] 19 Fed. Reg. 7521 (Nov. 22, 1954).

[92] 34 Fed. Reg. 12985 (Aug. 8, 1969).

Plainly, the quoted portion of this order establishes those matters of qualification for employment within which the Commission, in reliance upon its expertise, is to develop and apply criteria and standards. No one would suppose that this directive would entitle petitioners to reject every applicant who, for example, lacked post-graduate education. To the contrary, the Executive Order requires standards to be developed. Were petitioners uniformly to reject applicants because they lacked post-graduate education – and thus disregard their duty to develop standards concerning what education might be requisite to particular positions – they would be turning this Executive Order on its head.

Yet, this is precisely what petitioners have done with another of the articulated qualifications: citizenship. Rather than establish standards, as the order directs, petitioners have used the fact of citizenship as a device for total exclusion of those from among whom it is expected to select. 5 C.F.R. §338.101. Since a blanket exclusion cannot sensibly constitute the establishment of standards, petitioners' regulation thus perverts and contravenes Executive Order No. 10577.[93]

It is equally clear that the regulatory ban against resident aliens offends Executive Order No. 11478. As its title states, this order promotes and guarantees "Equal Employment Opportunity in the Federal Government." The preface of this 1969 order recites:

> [I]t has long been the policy of the United States government to provide equal opportunity in federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality (A.21).[94]

[93]See Comment, "Aliens and the Civil Service: A Closed Door?", 61 *Geo. L.J.* 207, 210 (1972).

Like many executive orders, Executive Order No. 11478 relies specifically upon constitutional authority for its force and effect.[95] Yet, respondents need no

[94]Clearly, as President Eisenhower is among those "recent Presidents," so is Executive Order No. 10577 among those measures that have "long . . . provide[d] equal opportunity."

[95]In 1969, when Executive Order No. 11478 was issued, Title VII of the 1964 Civil Rights Act, 78 Stat. 253, 42 U.S.C. §§2000e *et seq.*, did not apply to federal employment. Thus, while the Executive Order also invokes the authority vested in the President by statute, Title VII would not have been among those statutes.

Similarly, petitioners' reliance upon *Espinoza v. Farah Mfr. Co.*, 414 U.S. 86 (1973), is thus wholly misplaced (Pet. Br. 86-88). *Farah* "involve[d] interpretation of the phrase 'national origin' in Title VII of the Civil Rights Act of 1964." 414 U.S. at 87. The question therefore posed in that case was a statutory one, concerning the precise obligation of a legislative enactment. On the other hand, the instant case involves inherent constitutional obligations which have been imposed on petitioners through the Presidential order. The potential differences in the scope of these two types of obligations are manifest. For example, Title VII's general non-discriminatory purpose would not prohibit private employers from discharging red-haired workers on the basis of the color of their hair, since the statute does not cover this. Yet, the question of petitioners' ability under the Constitution and Executive Order No. 11478 to discriminate on the basis of hair color is an entirely different matter. As Section I of this Brief demonstrates, *supra*, all arbitrary and invidious discriminations run afoul of constitutional due process strictures.

Likewise, this Court's decision in *Morton v. Mancari*, ____ U.S. ____, 94 S. Ct. 2474 (1974), upon which petitioners also rely (Pet. Br. 88-89), is no more relevant. That case involved only considerations of statutory construction in regard to employment preferences for American Indians, a group explicitly protected by Title VII, the statute at issue.

recourse to extrinsic matter to demonstrate that petitioners' regulation directly contravenes Executive Order No. 11478. The order, on its face, manifests its purpose to prohibit discrimination against aliens like respondents. The last sentence of Section 6 of the order states:

> This order does not apply to aliens employed outside the limits of the United States (A.22).

Since executive orders are not issued as mere idle gestures, this language can only mean that the executive order *does* apply to resident aliens *within* the limits of the United States.[96] While petitioners' brief ignores the force of this point, their silence reinforces both its

[96]A comparative analysis of executive orders regarding civil service, which have been promulgated by Presidents over the past 36 years, further reveals that Executive Order No. 11478 prohibits discrimination against resident aliens in domestic federal employment. In Executive Order No. 7915, issued in 1938, citizenship was made an express requirement for those seeking civil service employment. 3 Fed. Reg. 1521 (1938), as amended by Executive Order No. 8587, 5 Fed. Reg. 4445, 4446 (1940). Yet, less than a decade later, President Truman promulgated Executive Order No. 9830, which expressly revoked Executive Orders Nos. 7915 and 8587. President Truman's order (which contained the exact language regarding citizenship as Executive Order No. 10577 issued in 1954) thus manifested a clear executive intent–reaffirmed in 1969 in Executive Order No. 11478–to eliminate discriminatory barriers against aliens in federal employment. Executive Order No. 9830, § 2.1(a) (1947).

merits and its express rejection of petitioners' discriminatory regulation.[97]

[97]The appellate court below agreed that respondents had "good reason" for their argument that petitioners' regulation conflicted with the Presidential order against employment discrimination. *Wong v. Hampton, supra*, 500 F.2d at 1036. Yet, the appellate court said the executive order was not "judicially reviewable . . . since [it] merely declares a general policy." *Ibid.* It is hardly surprising that the appellate court offered no support for this view, since it is clearly erroneous. *E.g., Espinoza v. Farah Mfr. Co., supra*, 414 U.S. at 89-90; *Cole v. Young, supra*, 351 U.S. at 551-558; *see also Greene v. McElroy, supra*, 360 U.S. at 500-502; *Cafeteria Workers v. McElroy, supra*, 367 U.S. at 891; *Jalil v. Hampton, supra*, 460 F.2d at 927; *Contractors Ass'n of Eastern Penn. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. den.*, 404 U.S. 854 (1971); *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632, n.1 (5th Cir.), *cert. den.*, 389 U.S. 977 (1967).

Nor did the lower court explain what was meant by its characterization of the order as merely "declaring a general policy." Clearly, the 1954 Executive Order No. 10577–which the lower court both reviewed and enforced (*Wong v. Hampton, supra*, 500 F.2d at 1034)–is even more general in its broad delegation of authority; in contrast, Executive Order No. 11478 deals with the relatively narrower area of employment discrimination. Moreover, on its face, Executive Order No. 11478 is a directive rather than a general order.

> The Civil Service Commission *shall* provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees . . . in order to assure that personnel operations in Government departments and agencies *carry out the objective of equal opportunity for all persons. Id.* at § 3 (emphasis added).

Sections 3, 4, and 5 of Executive Order No. 11478 also command petitioners to evaluate agency programs, mediate discrimination complaints, set up impartial review systems, and perform other tasks to reduce discrimination. Each of these commands is similarly reflective of a directive rather than a "general policy."

CONCLUSION

For the reasons stated above, respondents respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: December 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents' brief obscures the issues and rests upon premises not supported by the record. In their complaint, respondents claimed that the Civil Service Commission regulation was invalid because it limited the employment of "non-citizens" by the federal government (A. 6, 10-13; see also Resp. Br. 14, 53, 57, 64, 66).[1] In this Court respondents assert that the vice of the regulation is its effect upon "resident aliens" (*id.* at 9, 10, 14-17, n. 21, 22, 24, 25, n. 31, 30, 31, 33, 42, n. 51, 45, 46, 52, 53, 55, 58, 59, 65, 67, 68,

[1]The court of appeals sustained that claim, although it is not entirely clear whether the group whose employment opportunities the court found to be improperly restricted consisted of all aliens (Pet. App. 14a-19a, 22a-23a) or only "resident aliens" (*id.* at 2a, 12a, 20a-23a).

70), or, at least, "permanent resident aliens" (*id.* at 2, 6, 8, 39, 54), and they further claim that "each respondent had been admitted to the United States as a permanent resident alien * * *" (*id.* at 3). This seemingly narrower characterization of the disfavored group suggests that each respondent was "lawfully admitted for permanent residence" as an "immigrant" to the United States (cf. *id.* at 39). See 8 U.S.C. 1101(a)(15), (20).

The record establishes, however, only that two of the four respondents "immigrated" to the United States (see Pet. Br. 4-6, nn. 2-5), and does not establish that any of them was "lawfully admitted for permanent residence." In fact, it does not establish that all of them were lawfully admitted, have lawfully remained here, or are even "permanent" residents in the sense of having no intention to depart.

The distinction respondents would make between aliens lawfully admitted for permanent residence and other aliens, moreover, necessarily acknowledges the propriety of some general limitation on the employment of aliens. Their real quarrel is with the balance struck, which is essentially a matter of policy judgment.

2. Respondents err in repeatedly asserting that the Commission's regulation constitutes a "total," "complete," or "blanket" ban against any employment of aliens in "the federal government" or, at least, in the competitive civil service (Resp. Br. 6, 8-10, 20, 21, n. 27, 24, 27, n. 32, 29, 30, 41, n. 50, 45, 53-55, 58, 65-68). In fact, the Commission's regulations do not totally bar the employment of aliens, even in the competitive civil service. Thus, the Commission has continued the exception established by President Roosevelt permitting employment of aliens if there is a lack of eligible citizens (Pet. Br. 80, n. 66) and has since added

two other situations in which the citizenship requirement is inapplicable (*id.* at 81-82). Respondents' real grievance is that the range of exceptions is not greater, because they do not fall within the categories of aliens eligible under the regulations.[2]

3. Respondents have misapprehended the meaning of the executive orders on which they rely in seeking to sustain the judgment of the court of appeals on grounds expressly rejected by that court. Respondents contend that the Commission's regulation violates Executive Order No. 11478, which prohibits discrimination in federal employment on grounds of race, color, religion, sex or national origin (Resp. Br. 70). That order does not supersede the Commission's regulation, but means only that when aliens within the United States are otherwise eligible for employment they cannot be discriminated against on one of the listed grounds.[3]

---

[2]The exceptions to the general requirement of citizenship negate the premise of respondents' contention that, by excluding "all residents aliens from all federal employment * * * [the regulation] creates a conclusive presumption that all aliens—by virtue of that status alone— are unqualified for all federal employment" (Resp. Br. 30, n. 35).

That the Commission has not totally barred the employment of aliens in the competitive civil service is consistent with our view that the civil service laws authorize, but do not require, the use of citizenship as a qualification for such employment (Pet. Br. 72-85). Respondents' discussion of the legislative history (Resp. Br. 57-64) is wide of the mark, for it only tends to show, at best, that citizenship was not made an obligatory criterion, not that it was made an impermissible one.

[3]Respondents also err in suggesting that Executive Order No. 11478 "reaffirmed" an earlier order in 1947 eliminating the citizenship requirement (Resp. Br. 70, n. 96). Prior to 1947, the citizenship qualification, like many other substantive and procedural requirements for civil service employment, had been established by executive order, as had been the original practice (see Pet. Br. 79-80).

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1975.

In 1947, however, President Truman revised the Civil Service regulations so as to vest in the Commission itself substantial authority to administer the Civil Service laws, and repealed prior executive orders concerning civil service. Executive Order No. 9830, 12 Fed. Reg. 1259, 1269. The order authorized the Commission to establish standards concerning "citizenship" (12 Fed. Reg. 1262) in essentially the same terms as were used in the 1954 Executive Order upon which the current regulations are based (see Pet. Br. 3). The same day, the Commission promulgated regulations which, like the current regulations, carried forward the citizenship requirement that had previously been set forth in the executive orders. 12 Fed. Reg. 1281. In sum, rather than constituting an effort to eliminate barriers to employment of aliens, the 1947 executive order was simply part of a formal reorganization of the issuing authority, without substantive change in this regard.

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IN THE

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OCTOBER TERM, 1974

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ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, *et al.*,

Petitioners,

—v.—

MOW SUN WONG, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL,

Petitioners

-v.-

MOW SUN WONG, ET AL,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union files this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members devoted solely to the protection of the liberties safeguarded by the Bill of Rights. In its fifty-four year existence the ACLU has been particularly concerned with the right of aliens to enjoy the full protection of our Constitution. The ACLU has participated in numerous cases in this and other courts to challenge deprivations imposed upon non-citizens. The Union is also deeply concerned with laws that impose invidious discriminations upon distinct classes in our society, and believes that such invidious discriminations are no less violative of the Constitution when imposed by the United States than when imposed by the individual states. For these reasons we file this brief to urge affirmance of the judgment of the Court of Appeals.

ARGUMENT

I.

The Total Exclusion of Resident Aliens from All Employment in the Federal Civil Service Cannot Be Sustained on the Ground That Employment in the Federal Civil Service Is a "Privilege of National Citizenship" or That the Exclusion of Aliens from Such Employment Is Within the "Plenary Power" of the Federal Government.

In Sugarman v. Dougall, 413 U.S. 634 (1973), this Court held that the total exclusion of resident aliens from all public employment by the states was violative of the Fourteenth Amendment's guarantee of equal protection of the laws. Likewise, in In re Griffiths, 413 U.S. 717 (1973), it held that the states could not constitutionally deny resident aliens admission to the bar solely because of their status of alienage. As in Bolling v. Sharpe, 347 U.S. 497, 500 (1953), "[i]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." If a classification is invalid under the equal protection

clause of the Fourteenth Amendment, it is also inconsistent with the due process requirements of the Fifth Amendment. Johnson v. Robison, __ U.S. __, 94 S.Ct. 1160, 1164 n. 4 (1974). If the states cannot constitutionally discriminate against aliens with respect to eligibility for public employment on the ground that such employment is a "privilege of citizenship," it is difficult to see how the federal government can invoke the long-discredited "privilege-right" dichotomy to effect the same kind of discrimination.

But this is precisely what the government is arguing in seeking to overturn the judgment of the Court of Appeals in the case at bar. Heedless of this Court's clear pronouncement that is has "now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege,'" Graham v. Richardson, 403 U.S. 365, 374 (1971), the government nonetheless argues that employment in the federal civil service is a "privilege of national citizenship," so that the total exclusion of resident aliens from federal employment is constitutional, although the identical

exclusion when practiced by the states is unconstitutional.

In support of this argument it sets forth a very sophisticated - or, as we would submit, sophistic - line of reasoning, beginning with the "unique legal status" of aliens, going through the provisions of the Constitution limiting the right to vote and to hold office to citizens, and the practice of other nations in excluding aliens from governmental employment, and ending up with the conclusion that the Privileges and Immunities clause of the Fourteenth Amendment (which by its terms limits action by the states) somehow establishes employment by the federal government as a "privilege of national citizenship," so as to render constitutional under the Fifth Amendment discrimination practiced against aliens by the federal government that would be unconstitutional under the Fourteenth Amendment if practiced by the states. In the final analysis, however, this reasoning is nothing more than "old wine in new bottles," and is simply the invocation of the discredited "right-privilege" dichotomy to sustain the discrimination against aliens in federal employment.

It is clear that for constitutional purposes employment by the federal government can in no way be viewed as a "privilege," subject to any conditions the federal government wishes to impose and insulated from judicial review. United Public Workers v. Mitchell, 330 U.S. 75 (1974); Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973). But what the government is arguing here is that such employment is indeed to be treated as a "privilege" when it is denied to resident aliens because (1) aliens have a "unique legal status" and (2) such employment is a "privilege of national citizenship" established by the Fourteenth Amendment. The fact that aliens occupy a "unique legal status," however, has nothing to do with the invocation of the "privilege-right" dichotomy, since, as the government admits, aliens are "persons" within the meaning of the Fifth and Fourteenth Amendments." Brief for Petitioner, p. 27. While it may be true that all legal distinctions between citizens and aliens are not blurred, as the government contends, those distinctions must be supported by something other than the notion that citizens have the "privilege" of government employment while aliens do not. The discrimination effected

against aliens must be supported, as this Court has made abundantly clear, by the showing of a compelling governmental interest, Graham v. Richardson, supra, and the "unique legal status" of aliens as such cannot justify discrimination against them by the federal government once they have been admitted for permanent residence into this country and have not been deported.

The contention that the Privileges and Immunities clause of the Fourteenth Amendment justifies the denial of federal employment to aliens because such employment is somehow a "privilege of national citizenship" is utterly fallacious, and is nothing more than circular reasoning which assumes the very point in issue. The government argues that (1) aliens can be excluded from federal employment because such employment is a "privilege of national citizenship," and that (2) such employment is a "privilege of national citizenship" because it is employment with the federal government. What is totally missing from this analysis is an explanation of the reasons why employment with the federal government is a "privilege of national citizenship." According to the government, the test for determining what is

such a "privilege" is whether the "privilege" reasonably can be said to "inhere in that special relationship with the national government which is traditionally characteristic of citizenship." Brief for Petitioner, p. 36.[1] In other words, federal employment can be limited only to citizens, because it is a "privilege of national citizenship," and it is a "privilege of

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[1]The government, in formulating the supposed test of a "privilege of national citizenship," says that it must be determined whether the "right" is one of those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." Brief for Petitioner, p. 36. This test would necessarily mean that federal employment is a "privilege of national citizenship," since such employment owes its existence to the "Federal government, its National character, its Constitution, or its laws." The same rationale would mean that admission to practice before the federal courts is a "privilege of national citizenship." It might, therefore, be appropriate for the government to advise this Court whether its position is that an alien, who is entitled to practice before the state courts, In re Griffiths, supra, can constitutionally be denied admittance to practice before the federal courts.

national citizenship" because it involves a special relationship with the national government which is traditionally characteristic of citizenship. But there is no explanation whatsoever as to why employment with the federal government involves a special relationship which only a citizen can have, and such an argument merely assumes, ipse dixit, the point in issue.

In no way can the total exclusion of resident aliens from all federal employment be sustained on the ground that federal employment is a "privilege of national citizenship." Since aliens, no less than citizens, are "persons" within the meaning of the Fifth Amendment's due process clause, Galvan v. Press, 347 U.S. 522 (1954), they, like citizens, have a right to be employed by the federal government unless the government can advance constitutionally sufficient reasons to justify their exclusion. The day of the "right-privilege" dichotomy as applied to governmental employment is long since past, and the attempt of the government to revive that dichotomy in order to justify the discrimination against aliens in federal employment should be thoroughly rejected.

Continuing in this vein, however, the government adds a variation on the theme, namely that the total exclusion of resident aliens from federal employment is somehow related to Congress's power "to fix the conditions under which aliens are to be permitted to enter and remain in this country," and to the President's power over foreign relations, so that the exclusion is constitutionally valid "without regard to its rationality or the substantiality of its underlying reasons." Brief for Petitioner, p. 50. What the government appears to be arguing here is that the "plenary power" of Congress over immigration and naturalization entitles it to impose discriminations against aliens lawfully admitted for permanent residence that would be unconstitutional if imposed by the states and that the discrimination in question involves the exercise of the President's foreign affairs powers, so as to give rise to a "political question" effectively insulated from judicial review. Judicial review of the constitutionality of the federal government's actions in dealing with aliens, it says, is limited to determining whether such action contravenes an explicit provision of the Constitution or

otherwise clashes with those individual liberties protected by the Bill of Rights. Brief for Petitioner, p. 49. In short, the government argues that the "general principles of due process" contained in the Fifth Amendment do not apply to the federal government's actions in dealing with resident aliens.

Such an argument has consistently been rejected by this Court. See e.g., Wong Wing v. United States, 163 U.S. 228 (1896). In Galvan v. Press, 347 U.S. 522 (1954), for example, which the government cites for the proposition that "policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government," the Court said in the very next sentence that, "In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." 347 U.S. at 531. The Court also noted in that case, as the government admits, that "[s]ince he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process clause as is afforded to a citizen." 347

U.S. at 530. That case, as did the others cited by the government, involved the applicability of due process to deportation proceedings, and admittedly this Court has been reluctant to impose limitations on the substantive grounds for which an alien can be deported. But once an alien has been admitted to this country for permanent residence, and so long as he has not been deported, he is entitled to the same protections of the Constitution as are afforded to citizens. Just as, "[t]he phrase 'war power,' cannot be involved as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit," United States v. Robel, 389 U.S. 258, 263 (1967), the phrase "plenary control over immigration and naturalization" cannot render constitutional discrimination practiced by the federal government against resident aliens. As the Court of Appeals observed in the case at bar:

> "With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But

> once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government vis-a-vis citizens of this country." (Pet.App.A 13a, n. 11).

The argument that the "general principles of due process" contained in the Fifth Amendment do not apply to the federal government's actions in dealing with aliens is totally unfounded and has been consistently rejected by this Court. It would be unthinkable for this Court to sustain governmental action discriminating against resident aliens "without consideration of the rationality or the substantiality of the reasons that might underly it." Since aliens are "persons" within the meaning of the Due Process clause, the "general principles of due process" protect them from unconstitutional action on the part of the federal government in the same manner as the "general principles" of due process and equal protection contained in the Fourteenth Amendment protect them

from unconstitutional action on the part of the states.[2]

Neither the notion of federal employment as a "privilege of national citizenship" nor the notion of "plenary power over aliens" can sustain an otherwise unconstitutional discrimination under the Fifth Amendment's due process clause. The total exclusion of resident aliens from all federal employment is unconstitutional in the same manner as such exclusion when practiced by the states, unless the government can advance a justification for this exclusion which will withstand constitutional scrutiny. This, it is submitted, it cannot do.

---

[2]Even if the question of excluding resident aliens from government employment is somehow considered "political," the "talismanic incantation" of "political" likewise no longer operates to preclude judicial protection of constitutional rights. Powell v. McCormack, 395 U.S. 486 (1969).

II.

The Total Exclusion of Resident Aliens from All Employment in the Federal Civil Service Is Patently Arbitrary and Unreasonable, and Serves No Legitimate, Let Alone Compelling Governmental Interest.

The government argues that the total exclusion of resident aliens from all federal employment can be sustained as constitutional under either the "rational basis" test or the "compelling interest" test, and does not explicitly argue here, as it did in Weinberger v. Diaz, No. 73-1046, this Term, that classifications based on alienage when made by the federal government, as opposed to when they are made by the states, are not subject to the strict scrutiny of the compelling governmental interest standard. For the reasons advanced in its brief in Weinberger, the amicus would respectfully ask that this Court make it clear that classifications on the basis of alienage are no less inherently suspect when made by the federal government than when made by the states, and that such classifications

are in all circumstances to be subject to the strict scrutiny of the compelling governmental interest standard. But the amicus would also submit that, irrespective of the standard by which it is tested, the total exclusion of resident aliens from all federal employment is patently unconstitutional.

As the government appears to recognize, it has a heavy burden of persuading this Court that the discrimination with respect to total exclusion from public employment which this Court found unconstitutional when practiced by the states in Sugarman v. Dougall, supra, somehow becomes constitutional when practiced by the federal government. After noting that such discrimination is "hoary with age," and that it is practiced by many other nations as well, the government falls back on the supposed "plenary federal power to regulate with respect to aliens," and the "unique responsibilities" of federal employment to which it says that citizenship bears a "special relationship." All of these justifications were found wanting by the Court of Appeals, and they are clearly

insufficient to justify the total exclusion of resident aliens from all federal employment.

The "plenary power" argument involves the same circular reasoning as that advanced earlier by the government. The fact that the federal government has "plenary power" over immigration and naturalization cannot as such make constitutional what would otherwise be a violation of due process of law. As has been observed, "The federal government has interests different from those applicable to the states, but nonetheless, it must demonstrate that its interests justify the discrimination against aliens." Jalil v. Hampton, 460 F.2d 923, 929 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972). In other words, a classification based on alienage by the federal government is tested by whether it advances a compelling federal interest while such a classification by the states is tested by whether it advances a compelling state interest. Moreover, state regulation of aliens may be invalidated on pre-emption grounds, as in Hines v. Davidowitz, 312 U.S. 52 (1941). The point is that while, as the government argues, "a federal law or regulation concerning aliens may well be constitutional

even though an identical state statute would be valid," Brief for Petitioner, p. 62, this would only be because either (1) the state statute was invalidated on pre-emption grounds or (2) the federal statute was shown to advance a compelling federal interest while the state statute was not shown to advance a compelling state interest. The so-called "plenary power" over aliens that belongs to the federal government does not make constitutional discrimination against aliens by the federal government that cannot be shown to advance a compelling federal interest.[3] In Sugarman v. Dougall, supra, and In re Griffiths, supra, the total exclusion of resident aliens from public

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[3]The government suggests that if it were constitutionally required to open federal employment to resident aliens, it would be inhibited from negotiating the reciprocal termination of comparable discrimination against the employment of American citizens in the civil services of other countries. Brief for petitioner, p. 61. The notion that resident aliens may be used as "bargaining chips" to obtain benefits for American citizens residing abroad truly "shocks the conscience" and violates the first principles of due process of law.

employment and from admission to the bar were struck down as unconstitutional, since no compelling state interest for such exclusion could be shown. In the case at bar the total exclusion of resident aliens from federal employment must likewise be invalidated unless a compelling federal interest justifying such exclusion can be shown.

In trying to distinguish employment by the federal government from employment by the states, the government does no more than indulge in generalities about "nationhood," "sovereignty," "undivided allegiance" and the like. It says that citizens will be more "loyal" to the federal government than aliens and that they are more likely to have a knowledge and understanding of American history and of the principles and forms of the government. But it never explains why these considerations justify the total exclusion of resident aliens from some three million positions in the federal civil service. The closest it comes to trying to do this is when it says that it would be "administratively inconvenient" to classify the positions for which citizenship could

constitute a bona fide occupational requirement. Apart from the fact that "administrative convenience" is "insufficient to make valid what otherwise is a violation of due process of law," Cleveland Board of Education v. LaFleur, 414 U.S. 632, 647 (1974), the implication here is that most of these three million jobs could, for security or other reasons, properly be reserved to citizens. This is clearly absurd. The overwhelming majority of positions in the federal civil service do not involve policy-making and are in no way connected with national security. Most employees of the federal government, like most of the employees of state governments and like most persons employed by private industry, are engaged in the "common occupations of the country," and there is no reasonable relationship between citizenship and the ability to perform most of the positions in the federal civil service.

The vice of the exclusion contained in the challenged regulations, as in Sugarman v. Dougall, supra, is, of course, its overbreadth. There has been no effort on the part of the government to bar "some or all aliens from closely defined and limited

classes of public employment on a uniform and consistent basis." 413 U.S. at 639. And likewise, there has been no showing of a compelling, or even a legitimate governmental interest, that is served by barring all resident aliens from all positions in the federal civil service.[4] Even under the

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[4]The government makes much of the fact that Congress has long imposed statutory limitations on the employment of aliens in the continental United States. While this is indeed true and supports the government's contention that the regulations in question are in accord with Congressional authorization, the nature of the limitations totally undercuts the argument that there is any rational connection between citizenship and suitability for all federal employment. This is because the limitations do not extend to all resident aliens, but exclude nationals of specified countries. The current limitation, which is contained in the Treasury, Postal Service and General Government Appropriations Act of 1973, 86 Stat. 487, excludes aliens from Poland and the Baltic states, as well as those coming from countries "allied with the United States in its current defense effort." No rational reason can be suggested why aliens from these countries would be more suitable for federal employment than aliens from other countries. Moreover, as the government points out, there are a number of statutory exceptions to the ban on civil service employment of aliens. Brief for Petitioner, p. 84, n. 72. It is interesting to note, that all employment in the Department (con't.)

"rational basis" test the exclusion of all resident aliens from all federal employment is so irrational and arbitrary as to be violative of due process of law, because it creates a conclusive presumption that all aliens, by virtue of that status alone, are unqualified for all federal employment. C f. Cleveland Board of Education v. LaFleur, supra. A regulation that excludes persons from three million positions in the federal civil service solely because of their status as aliens can in no way be shown to be related to the accomplishment of any legitimate, let alone compelling, governmental interest.

When all is said and done, the government has done nothing more than argue that it is entitled to exclude resident aliens from all federal employment solely because they are

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(Footnote 4 con't.)
of Defense, The Atomic Energy Commission, and the National Aeronautics and Space Administration, for example, which would seem to involve the most sensitive positions requiring the highest degree of loyalty, are fully open to aliens. Surely, in view of the Congressional determination in this regard, it is utterly irrational to argue that there is any correlation whatsoever between the status of alienage and suitability for federal employment.

aliens. Whether it invokes the notion that federal employment is a "privilege of national citizenship" or that the federal government has "plenary power" over aliens, or that federal employment involves "unique responsibilities and relationships," it is simply arguing that aliens because of their status should not have the "benefit" of federal employment. This nation, however, has not readily countenanced discrimination against "discrete and insular minorities," and regardless of what may be the practice of other nations, this nation has treated resident aliens as "persons" entitled to the protection of its Constitution. The Fifth Amendment's guarantee of due process of law invalidates the total exclusion of resident aliens from all federal employment in the same manner as the Fourteenth Amendment's guarantee of equal protection invalidates the total exclusion of resident aliens from all public employment by state governments. As one Court has observed:

> "We conclude that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment for-

bidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states." Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D.P.R. 1974), appeal docketed, No. 74-216, this Term.

The discrimination effected by the total exclusion of resident aliens from all federal employment is clearly unconstitutional, and this Court should now so hold.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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OF THE

United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., *Petitioners*,

vs.

MOW SUN WONG, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SANDIGAN AND CHINESE FOR AFFIRMATIVE ACTION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Sandigan is a California non-profit corporation established to provide services and assistance to Pilipino* immigrants arriving and settling in San

[1]The letters of Petitioners and Respondents, consenting to the filing of this brief *amici curiae*, pursuant to Rule 42(2) of the Rules of this Court, have been filed with the Clerk of the Court.

*Sandigan requests that this brief reflect the preference of individuals who come from the Philippine Islands to be known as Pilipinos, not Filipinos.

Francisco. While Sandigan is a multi-service center, its principal emphasis is upon identifying and securing employment for Pilipino newcomers. Many of these new permanent residents are highly skilled and well educated but need help to overcome language barriers; others are not so well skilled and require placement in governmental training programs in order to compete in the current job market. In any case, Sandigan deals daily, on behalf of its clients, with prospective employers and government agencies to develop good employment or, at least, employment opportunities for Pilipinos.

Chinese for Affirmative Action [CAA] is an organization dedicated to defending the civil rights of the Chinese community in the United States. Based in San Francisco, CAA is actively engaged in securing health, education, welfare, manpower training, and economic services to meet the needs of Chinese communities. It has negotiated jobs for Chinese in both private and public employment sectors and has initiated many English and Chinese-language cultural programs on radio and television. CAA has also designed and promoted affirmative action plans for various businesses, unions, and government agencies for the employment of Chinese individuals.

ARGUMENT

INTRODUCTION

In America, the jobs people hold affect virtually every aspect of their lives. In a very real way, we are what we do. Employment dictates status. It affects self-esteem. Income from employment determines the quality of life, affecting many of its components, such as housing, medical care, nutrition and education.

Barriers to employment not only affect the life of the worker and his family but also make a significant impact on his community, particularly when large segments of the community are consigned to low-level, dead-end jobs in the private sector as a result of those barriers. The exclusion of resident aliens from almost 3,000,000 jobs in the federal civil service is such an obstacle.

San Francisco experiences this problem acutely. The city is a focus of immigration; resident aliens represent more than 10% of the city's population.[2] During the past ten years alone, 81,637 newly arrived aliens have established their residence in San Francisco.[3]

The denial of the opportunity to compete for merit system jobs is especially debilitating to the Asian community.[4] Nationwide, the number of immigrants from China, Taiwan and Hong Kong has increased from

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[2]73,031 aliens in a total population of 715,673. United States Bureau of the Census, Census of Population: 1970. DETAILED CHARACTERISTICS: Final Report PC(1)-D6, California Section 1, Table 144, p. 6-1205.

[3]United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972," (hereinafter "INS Report"), Table 34, p. 96.

[4]For conciseness and because San Francisco is a major residence for Asian immigrants, this brief focuses on Asians, particularly Chinese and Pilipino groups in San Francisco, to exemplify the difficulties faced by all resident aliens.

4,769 in 1965 to 21,730 in 1972.[5] Pilipino immigration to the United States has expanded from 3,130 in 1965 to 29,376 in 1972.[6] Immigrants to San Francisco from the Philippines have increased from 397 in 1963 to 2,846 in 1972, and immigration from China, Taiwan and Hong Kong to San Francisco has increased from 750 in 1963 to 1,434 in 1972.[7]

These newcomers, needing employment so that they can make a reality of their dream to establish new homes and new lives in our country, are confronted by drastically conflicting federal policies. With one hand they are welcomed as skilled immigrants and with the other hand they are rejected from employment in a significant sector of the economy.[8] The inconsistency of these federal policies is demeaning to the individual alien, devastating to his economic well-being, and debilitating to his community. The waste of human resources and the cost of government services to resident alien poor alone are persuasive evidence for affirmation of the decision of the Ninth Circuit.

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[5]INS Report, *supra*, Table 54.

[6]*Ibid.*

[7]*Id.* at Tables 12A, 12B and 13.

[8]The named plaintiffs, now respondents, in this action exemplify the consequences of the federal exclusionary policies at issue: Mow Sun Wong, with 10 years' experience as an electrical engineer, applied for a janitorial position (A.24, 25, 29). With almost 20 years as a businessman, Sui Hung Mok was trying to get work as a file clerk (A.25, 26). Francene Lum applied for an educational program evaluator position on the basis of 15 years' teaching experience (A.27). Kae Chong Lui worked satisfactorily for the U.S. Post Office on the mail loading platform (A.28). Yet each was deprived of the opportunity to perform work for which he was amply qualified, if not over-qualified.

IMMIGRATION AND THE AMERICAN LABOR FORCE: HISTORICAL CONTEXT

Immigration has been a continuing source of strength and needed manpower for the American economy. Immigration from non-European nations, particularly in the Eastern Hemisphere, began with the Industrial Revolution's need for laborers and there were few restraints placed on immigration from 1848 to 1882. Laborers from China, for example, were the primary workmen on the great transcontinental railways and a major work resource for development of the gold mines of California during this period.[9]

After the railroads had been built, and the economic boom from the gold rush had begun to fade, the demand for cheap labor subsided. Asians were compelled to compete for the relatively fewer available jobs. Massacres, anti-Asian riots, special "anti-Coolie clubs" and labor organization-sponsored boycotts of Chinese merchants resulted.[10] Municipal and statewide anti-Chinese laws abounded in California.[11] Even

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[9]Asians were actively recruited as long as a pressing need for cheap, hard-working laborers existed:

> "Chinese were often willing to perform labor which was uncongenial to the Caucasian; uncongenial because it involved domestic tasks, high risk, and long periods of strenuous work. As a result, Chinese laborers were widely sought and, in many instances, recruited directly from China."

Bay Area Social Planning Council, Working Paper VII, San Francisco, 1970, (hereinafter "BASPC Study") p. 53.

[10]*See, e.g., Yick Wo. v. Hopkins*, 118 U.S. 356 (1886).

[11]Perhaps the most infamous law passed in California was Article XIX of the State Constitution, added in the Convention of 1879. This amendment forbade the employment of Chinese in any corporation formed in the state, on any state, municipal and county public works, and provided for legislation whereby any city or town

the federal government reacted to the situation: the Chinese Restriction Act of 1882, as amended in 1884, was the first federal, racially exclusionary immigration law.[12] That Act suspended the immigration of Chinese laborers for ten years and denied naturalization to all Chinese. Subsequent enactments generally banned immigration by Asian persons until the repeal of the exclusion laws in 1943.[13] Thereafter, the quota system continued to keep Chinese immigration to a minimum.[14]

Immigration was not co-extensive with eligibility for citizenship. Although Chinese persons had been immigrating to the United States for nearly a century, they were barred from applying for U.S. citizenship until 1943.[15]

Pilipinos faced a more subtle, but no less discriminatory scheme. The Philippine Islands Independence Act was passed on March 24, 1934.[16] Shortly thereafter, the so-called Repatriation Act of 1935 attempted to encourage departure of Pilipinos by providing free transportation back to the Philippine Islands. Up until 1946 Pilipinos were not permitted to apply for U.S. citizenship.[17]

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might expel its Chinese inhabitants. Much of this amendment was rendered inoperative by judicial decisions. *See, In re Viburca Parrott*, 6 Sawyer 349 (1879); *In re Ah Chong*, 6 Sawyer 451 (1890); *In re Lee Sing*, 43 F. 359 (1890).

[12]22 Stat. 186, ch. 374, 46 U.S.C. §§151-162.

[13]57 Stat. 600, 8 U.S.C. §703.

[14]For an excellent summary, see BASPC Study, *supra*, at 55-59.

[15]57 Stat. 600, 601, 8 U.S.C. §703.

[16]48 Stat. 456, ch. 84.

[17]60 Stat. 416, 8 U.S.C. §703.

Shortly thereafter, in 1952, the Immigration and Nationality Act (commonly known as the McCarran-Walter Act) was enacted to modify the existing quota systems, leaving the Pilipinos with an annual limitation of 105 immigrant visas.[18]

This racially restrictive immigration policy was finally abandoned with the enactment of legislation on October 3, 1965. [19] The new law abolished the strict national origins quota system, substituting an allocation system emphasizing family reunification and preferred occupational skills. An annual numerical ceiling of 170,000 immigrant visas for persons from the Eastern Hemisphere was established, with a maximum of 20,000 visas available to any one independent country.[20] Asians viewed this new law as a signal that they were once again welcome in the United States.[21]

It is important, for the purposes of this case, to recognize that the great majority of Asians enter the

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[18]Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.*, 8 U.S.C. §§1551 *et seq.*

[19]8 U.S.C. §1151 *et seq.*, Public Law 89-236, amended the 1952 Act, 79 Stat. 911-920, 922.

[20]8 U.S.C. §§1151, *et seq.* Immediate relatives of U.S. citizens are allowed in, distinct from these maximums. INS Report, *supra*, Table 8, indicates that in 1973, 400,063 immigrants were admitted to the United States, about 30% (124,160) of whom were from Asian nations. The Asian immigrants with job qualifications classified as professional, managerial and skilled made up 31% of the total Asian immigration in 1973.

[21]From President Johnson's State of the Union message to Congress, January 8, 1964:

> "We must lift by legislation the bar of discrimination against those who seek entry into our country, particularly those with much needed skills and those joining their families." 110 Cong. Rec. (88th Cong., 2d. Sess., Jan. 8, 1964) p. 115.

United States as permanent resident aliens;[22] they intend to stay.[23] To do so successfully, these immigrants must be able to compete for a full range of meaningful employment options.

The barriers to employment of aliens, erected in the late 1800's,[24] have begun to lower. Now that the States may no longer ban resident aliens from public employment,[25] the federal civil service system remains the only substantial vestige of our former immigration policies.

IMPACT OF THE DENIAL OF FULL OPPORTUNITY IN THE LABOR MARKET

Although an analysis of the Immigration and Naturalization Service statistics indicates that Asian immigrants are both skilled and experienced,[26] permanent resident aliens are an economically deprived

[22]77.4% of all Asians, 85.1% of Chinese and 86% of Philipinos. INS Report, *supra*, Table 34 at 98. The remainder enter the country as students, visitors or for job-training purposes.

[23]"Unlike earlier Chinese immigration, which consisted in large part of single men who came to this country with the intention of returning to China after their fortunes were made, today's Chinese newcomers are most often families seeking a new life for themselves and their children within American society." BASPC Study, *supra*, p. 22.
Asian immigrants travel a great distance, not only in terms of geogra[illegible] but no less so in terms of culture, language and lifestyle. The decision to immigrate would not be made lightly.

[24]*E.g.*, *Truax v. Raich* (1915) 239 U.S. 33 (private employment); *Takahashi v. Fish & Game Comm.* (1948) 334 U.S. 410 (commercial fishing licenses); *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal. 2d 566 (public works projects in California).

[25]*Sugarman v. Dougall*, 413 U.S. 634 (1973).

[26]INS Report, *supra*, at 8.

segment of our society.[27] The federal regulation which has excluded resident aliens from federal civil service employment is a major contributing factor to this condition.

The adverse effects on the San Francisco Asian community are profound. First, of course, many job opportunities are lost. At least 27.8% of all Chinese male immigrants residing in San Francisco, aged 14-64, are unemployed—four times the city's average unemployment rate.[28] Pilipino resident aliens suffer an unemployment rate of 15-17%[29]—twice the city average.

Second, most of the recent non-white immigrants settle in a few highly concentrated areas where only limited job opportunities are available. Anxious to find any source of income, they work long hours for subsistence wages at jobs for which they are overskilled, with little chance of moving from the ghetto or of advancing in the labor market. At least 50%[30] of the Chinese resident alien community and a stag-

[27]Of unrelated Chinese and Pilipino individuals age 14 and above in San Francisco in 1969, 35.8% and 29.6%, respectively, were below the federal poverty level. This compares to a 20.3% figure for whites, "Ethnic Groups, Veterans and the Handicapped in San Francisco," State of California, EDD, No. Calif. Employment Data and Research, June 1974, p. 18 (based on the 1970 census).

[28]BASPC Study, *supra*, p. 40.

[29]Interview with Rod Estrada, then director of Sandigan, in August, 1974. Statistics are based on their comprehensive employment files.

[30]BASPC Study, *supra*.

gering 75%[31] of the Pilipino community are underemployed.[32]

Third, this pattern of unemployment-underemployment becomes so established it cannot be changed once citizen status is achieved. After a minimum of five years[33] of barely managing to survive in the secondary labor force, Asians find it difficult, if not impossible, to change from secondary to primary employment.[34] Their skills may no longer be relevant; time to seek out new and meaningful employment is limited, and diminished self-esteem may turn job failure into a self-fulfilling prophecy. The International Institute of San Francisco reports a typical case:

> "A Pilipino doctor and his wife are working as live-in domestics and will be saving part of their meager earnings for some time to bring over their four children. . . . He is ashamed to admit to his employer that he is a doctor. It is doubtful this doctor will ever be able to stop from his toil long enough to pursue additional education and study to qualify and prepare for professional and

[31]Estimate based on interviews in July and August 1974 with six major Pilipino community groups in San Francisco: Sandigan, Phil-Am Neighborhood Association, POC, PACEO, Pilipino Newcomers' Advisory Committee and the International Institute.

[32]Underemployment is generally defined as working at a less than full-time job, working full-time at less than the prevailing wage for that position, or working at a position not commensurate with one's skills.

[33]The minimum period required to qualify for citizenship status, 8 U.S.C. §1427(a).

[34]Primary jobs are those with prevailing wages for the occupation, fringe benefits, safe working conditions, promotional opportunities and training for advancement. Secondary jobs lack one or all of these conditions and are generally low-level, dead-end positions.

> State exams to enable him to practice medicine in California.[35]

Finally, the secondary effects of low economic status are highly evident. For example, Pilipinos, constituting 3.4% of San Francisco's population, account for 8% of the premature births and 10% of the reported cases of tuberculosis in the City.[36] Pilipino newcomers do not utilize the services of San Francisco General Hospital because, in their culture, usage of a "charity ward" is associated with loss of self-respect. However, many newcomers cannot afford private medical services and therefore do not receive proper medical attention.[37]

THE IMPACT OF OPENING FEDERAL JOBS TO RESIDENT ALIENS

Projections for the labor market indicate that governmental jobs are increasing at nearly twice the rate of jobs in private industry.[38] Because the government is the country's largest and fastest growing employer, and because entry is based on a merit system, opening civil service ranks to resident aliens would have a significant impact on their employment

[35]Pilipino Newcomers' Advisory Committee and International Institute of San Francisco, "Pilipino Immigration to California and the Contemporary Situation in San Francisco," March 1972, p. 11.

[36]San Francisco Department of Public Health, Statistical Report 1970, City and County of San Francisco, p. 12.

[37]Grassman, G., Health Care & the Filipino Community, San Francisco General Hospital, San Francisco, 1971, p. 7.

[38]U.S. Dept. of Labor Report, "New Job Opportunities" (1972).

rates. It would mean jobs for the unemployed and advancement of the underemployed. This, in turn, would result in increased income levels. As of March 31, 1972, the median annual income for domestic federal employees under the General Schedule pay plan was $12,553.[39] This compares with median annual incomes of $4,790 for Chinese and $5,145 for Filipinos in San Francisco.[40]

As of April, 1974, the domestic civilian federal workforce totaled 2,708,131.[41] 296,509 of those jobs were located in California as of December 31, 1973.[42] In the San Francisco/Oakland Standard Metropolitan Statistical Area alone, there were 73,436 federal jobs.[43] The government offers positions in almost every conceivable type of work, utilizing the immensely varied skills of the population. Likewise, the occupational skills of permanent resident aliens range from professional to technical to unskilled.[44] For example, an extraordinarily large percentage of Pilipino immigrants are officially classified as professional, technical

[39]United States Civil Service Commission, Bureau of Manpower Information Systems, Manpower Stats. Div., "Pay Structure of the Federal Civil Service, March 31, 1972." Table 2 at 13. The General Schedule plan covers 68.5% of the federal domestic workforce. The median annual income for all pay plans totals $11,820. *Ibid.*

[40]U.S. Dept. of Commerce, Bureau of Census, *Social and Economic Indicators*, Table 43, San Francisco, 1970.

[41]U.S. Civil Service Commission, Bureau of Manpower Information, Manpower Stats. Div., "Federal Civilian Manpower Statistics," June, 1974.

[42]*Ibid.*

[43]*Ibid.*

[44]INS Report, *supra*, Table 8 at 38. See Statement of the Case in Respondents' Brief in this case, filed December, 1974.

and kindred workers—27.9% in the year ended June 30, 1973.[45] Overall, 10,477 (32.6%) of the Pilipinos entering in the year ended June 30, 1973, would be qualified for positions under the General Schedule pay plan of the Civil Service. Another 3.8% (1,218) possess skills approximating those required for positions under the Wage System.[46]

Civil Service jobs are not generally sensitive positions. In fact, it is extremely ironic that the one exception allowing non-citizens to apply for federal employment is related to highly sensitive jobs.[47] It is also contradictory that aliens have an obligation to serve the government in the armed forces, where pay is lower than in civilian positions, and where there is no less, and quite possibly a greater, national security interest involved than in the Civil Service.[48] The prohibition against resident alien employment in the government service denies, on a totally non-job-related basis, employment opportunity to qualified applicants even in non-sensitive positions.

[45]*Ibid.*

[46]The General Schedule is basically equivalent to the government's white collar workforce, and the Wage System covers those workers in the trades, crafts and services. The figure represents the sum of the following white collar categories: Professional, technical and kindred workers; Managers, officials and proprietors; Clerical and kindred workers; and Sales workers. INS Report, *supra*, Table 8 at 38.

[47]5 C.F.R. §338.101(b)(1)&(2); 5 C.F.R. §213.3101-.3394; *Jalil v. Hampton*, 460 F.2d 923, 931 (D.C. Cir. 1972) (Bazelon dissent).

[48]A final irony is that veterans are normally awarded preference points in Civil Service competition—a preference which veteran aliens cannot use.

CONCLUSION

For the above stated reasons, and for those stated in the Respondents' brief, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated, San Francisco, California,
December 16, 1974.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., *Petitioners*,

vs.

MOW SUN WONG, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; CALIFORNIA RURAL LEGAL ASSISTANCE

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In the Supreme Court
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ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., *Petitioners,*

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICI CURIAE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; CALIFORNIA RURAL LEGAL ASSISTANCE

INTEREST OF AMICI CURIAE[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) was founded on May 1, 1968 as a non-profit corporation under the laws of the State of Texas. The headquarters of the organization are located in San Francisco with additional

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[1]Letters of consent from both parties have been filed with the clerk.

offices in San Antonio, Los Angeles, Denver, Albuquerque and Washington, D.C. MALDEF's primary purpose is to secure the civil rights of persons of Mexican descent through litigation and education. In its efforts to assist its client community achieve their rights under the law, MALDEF has handled litigation challenging the traditional barriers faced by persons of Mexican descent including discrimination in employment, deprivation of constitutional and political rights, and denial of equal educational opportunities.

California Rural Legal Assistance (CRLA) is a non-profit corporation established under the laws of California in 1966. It is funded by the United States Office of Economic Opportunity for the purpose of providing legal services to the rural poor of California, particularly farmworkers, the vast majority of whom are of Mexican descent. CRLA's administrative office is located in San Francisco and ten regional offices located in rural communities throughout California provide day-to-day services to clients. CRLA's governing board has determined that program resources shall be concentrated in the priority areas of employment, education, political and civil rights, and economic development. The organization has been particularly active in impact litigation challenging employment practices which tend to disproportionately exclude persons of Mexican descent.

Both MALDEF and CRLA are particularly concerned about the effects of non-job related hiring criteria which limit employment opportunities for the

client communities whom they serve. *Amici curiae* were founded for the express purpose of alleviating the causes of poverty in the Mexican and Mexican-American communities which they serve. To this end both organizations have been active in litigation in the area of employment discrimination and have thereby developed an intimate familiarity with the hardships caused to their clients by exclusionary policies of employers.

Although Spanish surnamed persons constitute, according to the United States Civil Service Commission's own figures, the second largest minority group in this country, representing about 6% of the total population,[2] they continue to lag far behind in securing jobs with the federal government. For example, only 2.9% of all federal jobs are held by Spanish surnamed employees.[3] Moreover, the average grade held by Spanish surnamed employees under the General Schedule is 6.49 as compared to 8.39 for all other non-minority employees.[4] The arbitrary exclusion of a significant proportion of the Spanish surnamed population from pursuing careers in the federal service has obvious consequences in terms of artificially limiting the pool of applicants from which employees may

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[2]See Civil Service Commission 1969-1970 minority group studies cited at *Federal Employment Problems of the Spanish Speaking*, Hearing before the Civil Rights Oversight Subcommittee, Serial No. 26 (March, 1972), p. 104 U.S. Government Printing Office.

[3]*Minority Group Employment in the Federal Government*, U.S. Civil Service Commission, U.S. Government Printing Office, No. 0600-00723, November 30, 1972, p. 3, Table 1-001.

[4]*Id.* at p. v.

be selected. The perpetuation of the citizenship requirement indiscriminately sweeps from the federal job market large numbers of able-bodied and willing Spanish surnamed workers, who, if afforded the opportunity to compete for jobs, would enable the government to achieve its stated purpose of increasing the number of Spanish surnamed employees.[5]

This action was initiated by four Chinese nationals, permanent resident aliens of the United States, on behalf of themselves and similarly situated non-citizens challenging the citizenship requirement for federal employment imposed by Civil Service Commission regulation, 5 C.F.R. Section 338.101. *Amici curiae* submit this brief on behalf of respondents in order to call to this Court's attention the magnitude of the hardship caused to United States alien residents especially those of Mexican descent by the regulation under scrutiny in this case. In addition, *amici* challenge the premises upon which petitioners' argument is founded: that the power of the federal government over aliens in this country is absolute and unfettered by the due process clause of the Fifth Amendment, and that the Fourteenth Amendment's Privileges and Immunities Clause somehow diminishes the scope of the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process Clause. In

[5]Executive Order 11478, 3 C.F.R. Section 133. Following the promulgation of Executive Order 11478, President Nixon, on November 5, 1970, announced a Sixteen Point Program outlining specific action to be taken by the U.S. Civil Service Commission in order to increase in a significant and dramatic fashion the numbers of Spanish surnamed employees in the federal government.

these and all respects, *amici* concur with the arguments advanced in respondents' exhaustive brief.

The most recent data compiled by the United States Bureau of the Census indicate that in 1970, 2,887,005 non-citizens above the age of 18 years were living in the United States.[6] They constituted 2.2% of all persons above the age of 18 living in this country. Under the Civil Service regulation challenged herein, opportunities for federal employment are foreclosed to this large number of men and women regardless of any other qualifications or fitness for work.

In the five southwestern states of Arizona, California, Colorado, New Mexico and Texas, where the largest portion of immigrants from Mexico settle, 441,230 Spanish surnamed aliens above the age of 18,[7] comprising 1.9% of the work age population, are denied employment in the competitive civil service simply because of their lack of citizenship.

[6]United States Bureau of the Census, United States Summary, Table 194; "Citizenship of the Population by Sex, Race, and Age: 1970."

[7]Data compiled by Census Service Facility, Berkeley, California, November 15, 1974. A state-by-state breakdown of the Spanish surnamed alien populations for the five Southwestern states is as follows:

State	Total population	Spanish surnamed alien population	Percentage Spanish surnamed aliens	Total population over 18 yrs. of age	Spanish surnamed alien population over 18 yrs. of age	Percentage of Spanish surnamed aliens over 18 yrs. of age
Arizona	1,770,900	20,042	1.1%	1,123,123	15,278	1.4%
Colorado	2,207,259	4,461	.2%	1,428,701	3,808	.3%
New Mexico	1,016,000	5,922	.6%	606,077	4,428	.7%
Texas	11,196,730	130,220	.1%	7,180,159	105,525	.1%
California	19,953,134	399,793	2.0%	13,301,356	312,191	2.3%
Total	36,144,023	560,438	1.6%	23,639,416	441,230	1.9%

In California alone 312,191 Spanish surnamed aliens, 2.3% of the population over 18 years,[8] are ineligible under Section 338.101 for federal employment. Even in the fifteen thinly populated rural counties served by California Rural Legal Assistance offices, 39,816 working age people,[9] immigrants from Mexico and other Latino countries, cannot compete for jobs with the United States Government despite any other qualifications which they might possess.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S ASSERTION FEDERAL POWER OVER LAWFUL RESIDENT ALIENS IS FULLY LIMITED BY THE EQUAL PROTECTION PRINCIPLE INCORPORATED INTO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioners' "primary submission" postulates that the power of Congress over immigration and naturalization conferred in Article I, Section 8 of the Constitution, combined with the residue of powers given to the President and to Congress over the national defense and the conduct of foreign relations, are "plenary". (Pet. Br. at 24.)[10] These powers, the argument runs, remove the government's decision to limit federal competitive civil service employment to citizens from this Court's full review and place that decision "beyond the reach of the equal protection

[8] "Citizenship of the Population," *op. cit., supra*, n. 6.

[9] *Id.* Table 25, Spanish American Population.

[10] References to the Petitioners' Brief are cited as (Pet. Br. at ——).

principle". (Pet. Br. at 25.) Yet nowhere do Petitioners explain why the plenary power conferred by the Immigration and Naturalization Clause should be viewed any differently from the other plenary powers conferred by the Article I commerce, armed forces, war powers, or foreign affairs clauses. Each of these powers is subject to the entire panoply of the Constitution's specific individual rights limitations, including the equal protection clause as incorporated by the Fifth Amendment. *See, Johnson v. Robinson,* 415 U.S. 361, 364-365, n. 4 (1974). Indeed, so is the immigration and naturalization power. *Schneider v. Rusk,* 377 U.S. 163 (1964); *Afroyim v. Rusk,* 387 U.S. 253 (1967); *Rogers v. Bellei,* 401 U.S. 815 (1971).

This Court has endorsed a broad range of congressional discretion to implement Article I powers. For example, it is axiomatic that regulations of commerce are within the plenary power conferred on Congress by the Commerce Clause, and may not be challenged unless they infringe some specific constitutional prohibition. E.g., *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1824); *United States v. Darby,* 312 U.S. 100 (1941); *Wickard v. Filburn,* 317 U.S. 111 (1942); *United States v. Brown,* 381 U.S. 437 (1965).

It is equally axiomatic that where individual rights are implicated in the exercise of Article I powers, Congress enjoys only a narrow discretion to select the means by which to implement those powers. In *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), it was held, for example, that Congress may not subject

an ex-serviceman to trial by court-martial. The Article I power to "make rules for the government and regulation of the land and naval forces" did not, according to the Court, "empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause." 350 U.S. at 21-22. Nor does Article I enable Congress to subject civilian dependents of servicemen abroad to trial by military tribunal, *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), or to subject a serviceman to military trial where his alleged crime was not "service-connected." *O'Callahan v. Parker*, 395 U.S. 258 (1969).

In *Trop v. Dulles*, 356 U.S. 86 (1958), this Court determined that Congress could not deprive a wartime deserter of citizenship as an appropriate means to implement the war-related powers of Article I. *Bowles v. Willingham*, 321 U.S. 503 (1944) held that, although national security interests during wartime might justify limitations on litigation rights otherwise enjoyed in peacetime, "even the war power does not remove constitutional limitations safeguarding essential liberties." *Id.*, 356 U.S. at 521, quoting *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426 (1934).

The foreign affairs power is also subject to limitations emanating from other provisions of the Constitution, even though the power to legislate for the regulation of foreign affairs is broader than is the

power to regulate domestic affairs. Thus, although the foreign affairs power is "plenary," it is not absolute. In *Afroyim v. Rusk*, 387 U.S. 253 (1967), this Court denied Congress the power to frustrate the Fourteenth Amendment by depriving a person of his citizenship against his will by "simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted." *Id.*, 387 U.S. at 263.

Even during the course of a military emergency, the war and foreign affairs powers do not justify domestic controls by the Executive that invade congressional provinces or individual rights. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court disapproved President Truman's seizure of the steel mills by which, acting pursuant to his combined war-related and foreign affairs powers, he sought to safeguard national security during a domestic labor dispute. Justice Jackson, in a concurring opinion, stated:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming that that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the nation's armed forces to some foreign venture.

Id., 343 U.S. at 642.

In the *Steel Seizure* case, notably, the Court refused to countenance the President's claim that his

action was authorized by the "inherent powers" of the Executive. Petitioners in the instant suit invoke similar powers to justify the executive order authorizing the Civil Service Commission to use "citizenship" as a qualification for federal civil service employment. (Pet. Br. at 46-48.) Justice Jackson recognized that the claim of "inherent power" is always available to "deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Id.*, 343 U.S. at 646. Justice Jackson also recognized that the very existence of emergency powers tends to create emergencies, affording a "ready pretext for usurpation." *Id.*, 343 U.S. at 650. Clearly, the invocation of the doctrine "inherent powers" is justified only in extraordinary circumstances, and none have been demonstrated by Petitioners in the instant case.

Petitioners posit yet another "plenary" power, the treaty power, identified in Article VI of the Constitution, which they claim, remarkably enough, enables the federal government to deprive both resident aliens and citizens alike of their rights to due process and equal protection of the laws. According to them, "Thus, no treaty could be challenged on the ground that it discriminated against one group of foreign nationals resident here or against citizens." (Pet. Br. at 24.)

A valid treaty does, for example, override a state law on matters otherwise within state control. This was recognized in *Ware v. Hylton*, 3 Dall. 199 (1796). But not even the classic formulation of the treaty

power announced in *Missouri v. Holland*, 252 U.S. 416 (1920), lends itself to the view that treaties permit national action specifically proscribed by the Constitution. In the *Holland* case, the Court expressly noted that the "treaty in question did not contravene any prohibitory words to be found in the Constitution." *Id.*, 252 U.S. at 433. Only upon that basis did the Court permit the Migratory Bird Treaty with Canada to interfere with rights otherwise reserved to the states. By comparison with the Tenth Amendment, which was the sole constitutional limitation at issue in the *Holland* case, the words of the Fifth and Fourteenth Amendments, which are at issue in the instant case, are expressly prohibitory. Moreover, the *Holland* case involved only the issue of the intrusion of national authority into local affairs, i.e., the concerns of federalism, not the more focused concerns of individual rights. As this Court has observed, the Tenth Amendment, "states but a truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941). The constitutional provisions protecting individual liberty are, by comparison, affirmative limitations on all the great powers delegated to the central government. See, e.g., *United States v. Brown*, 381 U.S. 437 (1965).

In *Reid v. Covert*, 354 U.S. 1 (1957), this Court expressly held that neither the language of Article VI, nor anything in the debates which accompanied the drafting and ratification of the Constitution, suggests that an agreement with a foreign nation could achieve that which the Constitution forbids:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

354 U.S. at 17. Notably, even in wartime, this Court has not permitted the unrestricted exercise of the war power that Petitioners now claim inheres in the peacetime exercise of the treaty power. *Trop v. Dulles,* 356 U.S. 86, 1958; *Bowles v. Willingham,* 321 U.S. 503 (1944); *Home Building and Loan Ass'n. v. Blaisdell,* 290 U.S. 398 (1934).

Obviously, Petitioners have confused "plenary" power with absolute and unrestricted power, building their argument on a premise which is both unsupportable and pernicious. "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution". *Reid v. Covert,* 354 U.S. 1, 5-6 (1957).

II. CONTRARY TO THE GOVERNMENT'S ASSERTION THE LAW WHICH CONFIRMS CONGRESSIONAL PLENARY POWER OVER ALIEN ENTRY AND DEPORTATION IS IRRELEVANT TO THIS LAW SUIT.

The case law which Petitioners cite for the proposition that Congress has plenary power "to fix the conditions under which aliens are to be permitted to enter and remain in this country" (Pet. Br. at 42) is irrelevant to the issues presently before the Court. That case law relates only to congressional power over the ingress and egress of aliens and not to congressional power over aliens in other contexts. Analytically the two powers are separate. Petitioners choose to blur them, urging that the expansive power operating in the first context should be held to operate in all other contexts of federal regulation of aliens. Such equivalence of power does not exist. The cases limit plenary or untrammeled congressional power to the context of ingress and egress.

Thus, the *Chinese Exclusion Case,* 130 U.S. 581 (1888), dealt with the power of Congress to prohibit the return of a Chinese alien to the United States following his earlier visit abroad. In *Fong Yue Ting v. United States,* 149 U.S. 698 (1893), the Court endorsed the deportation of an alien who lacked a registration certificate. *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948), invalidated the California denial of fishing licenses to aliens on the ground that it conflicted with the exclusive federal power to regulate immigration and naturalization. In that case, the Court did allude to the broad powers of the federal government "in determining what aliens

shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization". *Id.*, 334 U.S. at 419. Clearly, however, this language confines congressional power exclusively to matters of entry, naturalization and deportation.

Johnson v. Eisentranger, 339 U.S. 763 (1950), involved the wartime treatment abroad of enemy alien prisoners of war; none of these prisoners had ever resided within the territorial jurisdiction of any American civil court and hence were not entitled to the constitutional protections granted to resident aliens. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), as well as *Galvan v. Press*, 347 U.S. 522 (1954), focused on the congressional power to deport subversive aliens because of membership in proscribed organizations. In *Flemming v. Nestor*, 363 U.S. 603 (1960), the Court only examined whether Congress could make the fact of deportation relevant to its regulation of the Social Security system. *Boutilier v. Immigration Service*, 387 U.S. 118 (1967), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), upheld congressional power to deny entry to a homosexual, on one hand, and to a Marxist economist on the other.

This dichotomy between the power to control ingress and egress and the power to regulate the lives and actions of lawful resident aliens is critical; it must be observed if resident aliens are to be accorded any rights under the Constitution whatsoever. This Court having so recently reaffirmed the protection afforded lawful resident aliens under the Fourteenth

Amendment's Equal Protection Clause, *vis-a-vis* the States, *e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973), it now can hardly rule that the federal government is free of the equivalent constraints under the Due Process Clause of the Fifth Amendment. See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk*, 377 U.S. 163 (1964); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). Just as "Congress does not have the power to authorize the individual states to violate the Equal Protection Clause", "*Shapiro v. Thompson*, 394 U.S. 618 (1969), quoted in *Graham v. Richardson*, 403 U.S. 365, 377-378 (1971), Congress and the Executive may not directly violate those guarantees. To sustain its civil service disability, the federal government must meet the same equal protection standard of demonstrating a compelling governmental interest that the States have been required to meet in attempting to justify public employment discrimination. As the Brief of the Respondents shows, the Petitioners are no more successful in meeting this burden than was the State of New York in *Sugarman v. Dougall*, 413 U.S. 634 (1973).

III. THE FRAMERS OF THE CONSTITUTION AND OF THE FOURTEENTH AMENDMENT DID NOT INTEND TO MANDATE SUBSTANTIALLY DISPARATE PROTECTION OF CITIZENS AND LAWFUL RESIDENT ALIENS.

Petitioners rely heavily on the Privileges and Immunities Clause of the Fourteenth Amendment for the proposition that the Constitution itself authorizes preferred treatment for citizens. This proposition is patently false. Neither the Framers of the Constitution nor the Framers of the Fourteenth Amendment intended that alien "persons" within the United States should enjoy rights and protections substantially inferior to those enjoyed by citizen "persons."

In *Reid v. Covert,* 354 U.S. 1 (1947), Justice Black examined the purpose of the Framers of the Constitution to determine whether they intended to permit the trial of civilians in military courts either "under the guise" of regulating the armed forces or under the "necessary and proper" power. He concluded that such a result "would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded." *Id.,* 354 U.S. at 23.

The intent of the Framers is equally unmistakable with respect to the issues presented by the instant suit. The Framers would have found Petitioners' assertion that the decision to limit federal civil service to citizens is beyond limitation by the equal protection principle, equally incredible.

Citizenship was a concept almost totally ignored by the Framers. The Constitution in fact rarely distinguishes between citizens and aliens, probably be-

cause the Founders sought to attract, and not to discourage, immigrants. To that end, the Framers rejected insular attempts to impose exacting naturalization requirements. F. Franklin, The Legislative History of Naturalization In the United States, ch. II (1969). They did limit certain elected offices to citizens, and various Amendments, namely the Fifteenth, Nineteenth, and the Twenty-Sixth, later prohibited discrimination against the right of citizens to vote. Of the great clauses of the Constitution, however, only the Privileges and Immunities Clause of the Fourteenth Amendment presumes to grant rights to "citizens" as opposed to other "persons." All other directives in the Constitution refer to "person," "persons," "the people," or "the accused." Thus the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments apply to any "person;" the Fourth Amendment speaks of "the people" and of "persons;" the First Amendment protects "the right of the people" to assemble and petition government; the Sixth Amendment delineates the rights of "the accused;" and the Ninth and Tenth Amendments reserve to "the people" rights not specifically delegated by the Constitution. At least prior to the passage of the Citizenship and Privileges and Immunities Clauses of the Fourteenth Amendment, then, the concept of citizenship was of minor significance to the Framers.

With characteristic scholarship, the late Alexander M. Bickel observed that:

> No wonder, then, that citizenship was nowhere defined in the original Constitution. It was not

important. To be sure, implicitly, the citizen has a right freely to enter the country, whereas the alien did not; and implicitly also the citizen, while abroad, could be held to the obligation of allegiance, and might under very specific conditions be found guilty of the crime of treason for violating it, while the alien generally could not. But these were hardly critical points, as the Framers demonstrated by saying nothing explicit about them. It remains true that the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself as bound by certain standards of conduct in its relations with people and persons, not with some legal conduct called citizen.

A. Bickel, *Citizenship in the American Constitution*, 15 Ariz. Law Rev., 369, 370 (1973).

This lack of concern for distinctions between citizens and non-citizens prevailed undisturbed until enactment of the Fourteenth Amendment, with its definition of United States citizenship and its Privileges and Immunities Clause. Although the Framers of the Fourteenth Amendment took account of citizenship, they did not intend thereby to produce the barrier to the enjoyment of rights by aliens that Petitioners contend it produces. Their primary concerns were to secure the citizenship of the newly "Freedmen" and to guarantee by every means possible their enjoyment of all rights and privileges previously enjoyed only by white people. *See, e.g., Slaughter-House Cases,* 16 Wall. 36 (1873).

Because the *Dred Scott* decision, *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857) had excluded the Negro

from constitutional protection by denying his capacity to secure "citizenship," thereby rooting his inferior status in the Constitution itself, the Congress of 1866 felt it imperative to repudiate that decision in no uncertain terms. Thus only because the *Dred Scott* decision addressed the subject of "citizenship" did Congress address the subject in drafting the Fourteenth Amendment. "In the process, as a matter of syntactic compulsion, of stylistic necessity, as a matter of the flow of the pen, the concept of citizenship was again brought to the fore. Rights were made to depend on it as a convenient device of draftsmanship." A. Bickel, *supra,* 15 Ariz. Law Rev. at 373.

The author of the Privileges and Immunities Clause was John A. Bingham, a Representative of Ohio. A Republican colleague of his from the House recalled that Bingham himself understood little by the phrase but that such did not deter Bingham. "Its euphony and indefiniteness of meaning were a charm to him." C. Fairman, Reconstruction and Reunion 1864-88, Vol. II, History of the Supreme Court of the United States (P. Freund ed. 1971) at 1270. In fact, none of the drafters of the Fourteenth Amendment seemed to know the meaning of the Clause. Senator Howard, the principal proponent of the Amendment, certainly did not, nor did Senator Reverdy Johnson, one of the most respected constitutional authorities of the day who said of the clause, "I do not understand what will be the effect of that." *Cong. Globe,* 39th Cong., 1st Sess, at 3041 (1866). Undaunted, Congress passed the provision, satisfied only that the language would help eliminate the inferior status of Negroes.

Plainly, at least so far as its legislative history is concerned, the Privileges and Immunities Clause of the Fourteenth Amendment is not the constitutional barrier to equal protection for lawful resident aliens that the Petitioners claim. Thus both the Framers of the Constitution as well as the Framers of the Fourteenth Amendment would have abjured any interpretation that the federal government's treatment of non-citizen residents need not be in accordance with the guarantees of Equal Protection and Due Process. (Compare the 1866 statement of Senator Howard that the Due Process and Equal Protection Clauses: ". . . disable a State from depriving not merely a citizen of the United States, but any person. . . . of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State." C. FAIRMAN, *supra*, at 1295).

Just as the Framers of the Privileges and Immunities Clause had great difficulty in articulating its contours, the subsequent history of the clause reveals that those who came after fared little better. Whatever sporadic attempts have been made since the *Slaughter-House Cases*, 16 Wall. 36 (1873), to enlarge upon those rights peculiar to citizenship, the development of the Privileges and Immunities Clause itself has been overshadowed by the growth and elaboration of the Due Process and Equal Protection Clauses. The result is that those Clauses which speak of "persons," as opposed to "citizens," have primary vitality.

In spite of this history, Petitioners point to the list of privileges and immunities announced in *United*

States v. Moore, 129 Fed. 630, 663 (C.C.D.C. Ala.), noting that "citizens" secure under the Privileges and Immunities Clause, *inter alia:* the right "to be protected from lawless violence while in the custody of the United States;" "the right to be exempt from discrimination on account of race, as to equality before the law;" and "the right to be free from slavery or involuntary servitude, except as a punishment for crime." (Pet. Br. at 37-38.)

Do Petitioners mean to assert by this litany of "privileges and immunities of United States citizenship" that resident aliens, lacking that special relation of citizenship to the national government, legally would be subject to brutal violence while in the custody of a federal marshall? Do Petitioners mean to assert that a federal marshall himself would be permitted to perpetrate "lawless violence" in order to coerce a confession of guilt, for example, to be used in a criminal prosecution? May resident non-citizens be subjected to involuntary servitude? And what is the effect of disclaiming, on the one hand, that the rights of aliens to due process and equal protection of laws "can be abrogated by legislative expansion of the Privileges and Immunities Clause" (Pet. Br. at 39), and then, on the other, listing as one of the core attributes of citizenship the right to equality before the law? Surely aliens, too, enjoy these "privileges and immunities."

Whatever irreducible legal significance citizenship bears in our system, "persons" and not "citizens" receive the Constitution's primary protection. For that

reason, for example, deportation procedures have been required to conform to the standards of procedural fairness. See, *e.g.*, C. Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A.J. 34 (1964). And for that reason this Court has progressively expanded its protective role to comport with ever-changing notions of justice in the context of state infringements on the rights of non-citizens. It would be anomalous at the very least, and a major setback for the rights of all aliens, if this Court were to withdraw that protection in this instance.

CONCLUSION

For the above reasons, and for those stated in the Respondents' brief, the decision below should be affirmed.[11]

December 16, 1974.

Respectfully submitted,

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No. 73-1596

In the Supreme Court of the United States

OCTOBER TERM, 1975

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v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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We file this supplemental brief to discuss the import of a decision of this Court subsequent to the original argument in this case, to address a question raised for the first time during that argument, and to bring to the Court's attention newly-enacted legislation.

1. The Civil Service regulation in issue generally limits, but does not totally prohibit, the employment of non-citizens in the competitive federal civil service. The only general exception is for non-citizen nationals

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who owe permanent allegiance to the United States (Pet. Br. 4).

In claiming that the regulation is unconstitutional, respondents do not contend that alienage is always an impermissible criterion for federal policy or federal employment. Rather, they contend that the challenged regulation sweeps unecessarily broadly by excluding most aliens from federal employment (Resp. Br. 20–31). In essence they argue that citizenship may be used as a criterion for federal employment only on a case-by-case basis in response to a particularized need for use of that criterion (Resp. Br. 28–29). In urging that the regulation lacks a rational basis, respondents rely on cases such as *Vlandis* v. *Kline,* 412 U.S. 441, and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (see Resp. Br. 30, n. 35).

It is our position (Pet. Br. 66–71) that such challenges to the balance struck concerning the employability of aliens should be directed to Congress or the Executive and are not an appropriate subject for judicial re-evaluation. Congress has authorized the President to adopt regulations that will best promote the "efficiency" of the civil service. 5 U.S.C. 3301(1). Exercising that authority, the Civil Service Commission has determined—properly, we submit—that a general limitation on the eligibility of aliens is more efficient than would be individualized determinations as to whether alienage should render a particular person ineligible for a specific position (see Pet. Br. 67–69). We believe that the constitutionality

of that approach has been confirmed by the Court's recent decision in *Weinberger* v. *Salfi,* No. 74-214, decided June 26, 1975.

In *Salfi* the Court held that in cases involving social welfare legislation or noncontractual claims to receive funds from the public treasury Congress is entitled to use broad classifications, so long as those classifications do not burden fundamental personal rights. Slip op. at 16–20, 25, 33. In rejecting a contention that eligibility must be ascertained case-by-case, the Court observed in *Salfi* that "[t]he administrative difficulties of individual eligibility determinations" may properly be considered to justify "rules which sweep more broadly than the evils with which they seek to deal." *Id.* at 32. As the Court stated, the Constitution does not preclude "a substantive policy determination that limited resources would not be well spent in making individual determinations" (*ibid.*) and that a particular program may be best served by a rule that is "objective and easily administered" (*id.* at 33). Where, as here, individualized determinations of whether a particular alien might be a security risk, has divided national loyalties, ought not to be given policy-making power, and so on, would be exhausting and inexact, and where, as here the program in issue "do[es] not involve affirmative government action which seriously curtails important liberties cognizable under the Constitution," the Court should follow *Salfi's* holding that (*ibid.*):

> There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized

rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.[1]

2. We have argued that the challenged regulation, which prevents the federal government from hiring aliens in certain circumstances, should be viewed as a limited exercise of the substantial powers of Congress and the Executive to prescribe the categories of aliens who may enter and remain in this country and the conditions under which they may do so (see Pet. Br. 13–14, 42–48). In response to this contention, a suggestion was made at oral argument that if Congress had directly prohibited aliens from working for the federal government as a condition of entering or remaining in this country, it might be an "unconstitutional condition." The rationale of this Court's decisions concerning "unconstitutional conditions" does not, however, support such an argument.

The doctrine of unconstitutional conditions originally developed in a series of cases involving state laws that required out-of-state corporations, as a condition of entering the State and exercising the "privilege" of engaging in intrastate commerce, to waive or relinquish specific rights or privileges protected by the Constitution, or to consent to the State's exercise of jurisdiction beyond limits imposed by the Constitution. See, *e.g.*, *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583; *Terral* v. *Burke Construction Co.*, 257 U.S. 529, 532–533; *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1; cf. *Parden* v. *Terminal Ry.*, 377 U.S. 184, 193–194, n. 11; *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9–10, n. 10; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 282 U.S. 311, 328–331. See generally Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. Pa. L. Rev. 879 (1929); Oppenheim, *Unconstitutional Conditions and State Powers*, 26 Mich. L. Rev. 176 (1927).

Absent such interference with a specific constitutional right, which would override state law by virtue of the Supremacy Clause, the Court has assumed "that the State has the power and constitutional right arbitrarily to exclude the [foreign corporation] without other reason than that such is its will." *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434. The doctrine of unconstitutional conditions developed in the Commerce Clause cases thus imposes relatively limited restrictions "upon what still remains the practically arbitrary power of a State in dealing with the desire of

[1] While the Court was specifically concerned in *Salfi* with an act of Congress concerning eligibility for Social Security survivor's benefits, its analysis is no less applicable to federal regulations, as the Court's reliance upon *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, makes clear. See *Salfi*, *supra*, slip op. at 22–25. Moreover, the power of Congress and the Executive branch with respect to federal government employment is even greater than the power of Congress concerning social welfare legislation (see Pet. Br. 23–50).

unconstitutional conditions doctrine does not affect the regulation involved here.[4]

In any event, application of the doctrine of unconstitutional conditions to the federal government's powers over immigration would be inconsistent with the long line of this Court's decisions subjecting the exercise of that power to only the most limited judicial review (see Pet. Br. 48–50).

3. Finally, as indicated in the Appendix to this supplemental brief, during its present and preceding sessions Congress has continued to enact a variety of legislation distinguishing in diverse ways between citizens and aliens. This legislative adherence to citizenship and alienage as proper criteria for shaping national policies is entitled, we believe, to considerable respect.

Respectfully submitted.

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Solicitor General.

DECEMBER 1975.

[4] The Court's reaffirmance of *United Public Workers* v. *Mitchell*, 330 U.S. 75, in *Letter Carriers* is significant in this regard, for the earlier decision had been characterized as being inconsistent with the unconstitutional conditions doctrine. See Van Alstyne, *supra*, 81 Harv. L. Rev. at 1447.

APPENDIX*

5 U.S.C. (Supp. IV) 552a(a)(2). Rights of individuals under Privacy Act of 1974 extend only to citizens and aliens lawfully admitted for permanent residence.

5 U.S.C. (Supp. IV) 8701(a)(B) and 8901(1)(ii). Federal employees who are not citizens or nationals of the United States are ineligible for federal life and health insurance programs if permanent duty station is outside the United States and the Panama Canal Zone.

7 U.S.C. (Supp. IV) 2044(b)(6) and 2045(f). Farm labor contractors may not employ aliens not lawfully admitted for permanent residence or authorized by Attorney General to accept employment.

10 U.S.C. (Supp. IV) 2004(b). Commissioned officers of the armed forces are eligible for detail as law students only if citizens.

16 U.S.C. (Supp. IV) 460*l*–6a(a)(4). Of citizens and domiciliaries of the United States are eligible for lifetime national parks and forest admission permits.

18 U.S.C. (Supp. IV) 613. Persons who are not citizens or lawfully admitted for permanent residence

*Like the Appendix to our main brief, this Appendix, covering the enactments of the 93d and 94th Congresses through April 1975, includes only permanent legislation embodied in the United States Code that unequivocally distinguishes between citizens of the United States and aliens. We have not included in either appendix appropriations acts or other legislation pertaining only to the District of Columbia or other areas subject to the jurisdiction of the United States, or statutes that appear to refer to "citizens" only in a non-technical sense or only in a "findings" section.

are prohibited from making political campaign contributions.

19 U.S.C. (Supp. IV) 1330(a). Members of International Trade Commission must be citizens.

22 U.S.C. (Supp. III) 2872(b)(2). Only citizens are eligible to be voting members of Board for International Broadcasting.

26 U.S.C.A. (Supp. 3) 6096(a). Non-resident aliens may not designate payment of portion of income tax liability to Presidential Election Campaign Fund.

26 U.S.C.A. (Supp. 3) 6428(h). Nonresident aliens are ineligible for automatic $100 tax credit.

29 U.S.C.A. 633a. Aliens employed outside the limits of the United States are excepted from prohitions against discrimination based on age in personnel actions taken by specified parts of federal and District of Columbia governments.

29 U.S.C.A. 1003(b)(4) and 1321(b)(7). Employee pension plans and other benefit plans maintained outside the United States primarily for the benefit of persons substantially all of whom are non-resident aliens are excepted from coverage of provisions protecting employee pension plans and other benefit plans.

33 U.S.C. (Supp. 1) 1502(5), (12) and 1503(g). Noncitizens are ineligible for licenses to own, construct and operate deepwater ports in waters beyond the territorial limits of the United States.

38 U.S.C. (Supp. III) 1002(4). Citizens who served in armed forces of allied government may be buried in national cemeteries.

42 U.S.C. (Supp. III) 4954(c). Volunteers in anti-poverty programs who are not citizens or nationals of the United States need not take oath specified by 22 U.S.C. 2504(j).

42 U.S.C.A. (Supp. 1) 5816(h). Energy Research and Development Administration is authorized to employ non-citizens in expert, scientific, technical, or professional capacities whenever the Administrator deems it in the public interest.

42 U.S.C.A. (Supp. 1) 5841(a). Members of Nuclear Regulatory Commission must be citizens.

42 U.S.C.A. (Supp. 1) 5906(b)(2)(A). Directors of boards of joint Federal-industry corporations formed to develop non-nuclear energy technology must be citizens.

45 U.S.C.A. (Supp. 1) 231(h)(6)(iii). Remuneration for services performed by nonresident aliens for periods while temporarily present in the United States pursuant to 8 U.S.C. 1101(a)(15) (F) or (J) are excluded from coverage of Railroad Retirement Act of 1974.

45 U.S.C.A. (Supp. 1) 231(d)(3). Services rendered when outside United States by persons not citizens or residents of United States for employer required by laws of place of services to employ citizens or residents thereof are excluded from coverage of Railroad Retirement Act of 1974.

47 U.S.C.A. (Supp. 1) 303(*l*)(3), 310(b), (c). Alien may operate amateur radio station only under specified circumstances.

47 U.S.C.A. (Pocket Part) 1301(22). Only citizens of the United States may be "intrastate air carriers" for purposes of the Federal Aviation Act.

50 U.S.C. App. (Supp. III) 2019(b). Only citizens of the United States or of the Trust Territory of the Pacific Islands are eligible to file Micronesian war claims.

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